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THE MANITOBA SCHOOL QUESTION

CONSIDERED

HISTORICALLY, LEGALLY AND CONTROVERSIALLY

BY

LOUIS P. KRIBS.

Toronto:
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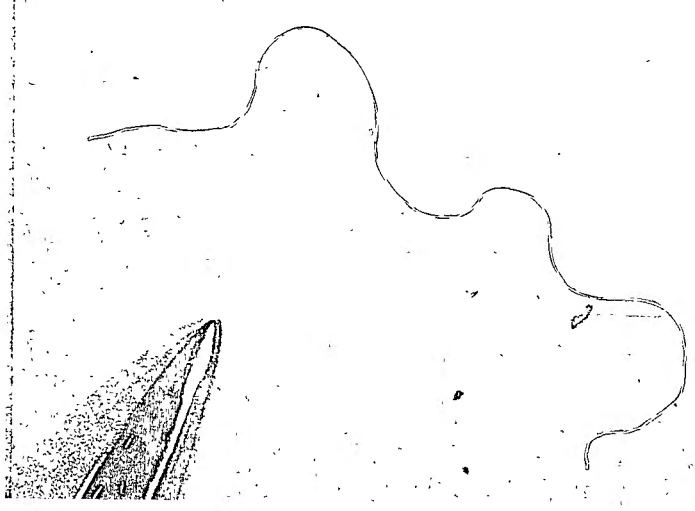

PREFACE

It is usually, I think, the case that the reader will first peruse the work and then if time allows glance over the preface. You will lose nothing by adopting that most excellent plan in the present instance, providing either the work itself or the preface are thought worthy of attention.

I commenced a somewhat minute study of the history of the educational question in Canada with relation to denominational, dissentient and Separate Schools in the full belief that so far as Manitoba was concerned it was impossible, considering the date at which that Province entered the Union, that a minority—a very small minority—could have rights that overrode the will of the Legislature as expressed by an overwhelming majority.

I will not deny that as a Protestant and an Orangeman, having no sympathy with Separate Schools as schools, though desirous of allowing my fellow-subjects of the Roman Catholic faith every possible liberty of conscience and latitude of action, my desires may not have to some extent influenced my views as above expressed.

That the inexorable Facts as ascertained by careful study, force me to the opposite conclusion—to the conclusion that indubitably the Roman Catholic minority in Manitoba have in regard to Separate Schools, Rights under the law—guaranteed by the constitution and pledged by the nation, lead to the belief that there might be many others, similarly circumstanced as I was and equally desirous of knowing the truth and abiding by it.

For, I venture to submit with certain confidence that the National Honor is of even greater importance than the National School, and that the preservation of the former is essential to the eventual establishment of the latter.

The present work is designed to give those who wish to get at the facts a ready means of doing so. It contains, I believe, everything material to a full understanding of the matter under discussion, and yet kept within a compass that will not appal a busy man. Wherever possible legal terms have been avoided and popular language used, the aim being to supply a book of instruction but not necessarily a text book. For a similar reason a number of the arguments advanced and deductions drawn by platform speakers and writers in the press have not even been mentioned—they would but cloud the issue without adding to the data.

May I urge here the wisdom, and not alone the wisdom but the duty—the patriotic duty—of every Canadian, at a time like the present, when questions are at issue calculated to arouse the most rancorous feelings, the most heated prejudices, the dangers of a sectarian strife the end whereof no man can forsee, to remember that the utmost tenderness and consideration for the consciences of others is perfectly consistent with the most valorous defence of the dictates of his own, and that the equities of a dispute are not found in the strength of one party or the weakness of the other.

He who lights the fires of sectarian strife burns straw it is true, but a blaze of straw may start a conflagration that will consume the whole fabric of our confederation.

Let us settle our differences justly—therefore amicably—and instead of destroying Confederation build up in Canada a nation.

LOUIS P. KRIBS.

TORONTO, *May, 1895.*

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From the Capitulation to Confederation.

The articles of Capitulation of Quebec (1759) and Montreal (1760) stipulate :—

"That the free exercise of the Catholic, Apostolic and Roman Religions shall be "preserved."

This stipulation was formally and solemnly ratified and made a perpetual covenant between the nations of Great Britain and France by the Treaty of Paris (1763), containing the cession of Canada from France to Great Britain, in the following terms :—

"His Britannic Majesty on his side agrees to grant the liberty of the Catholic "religion to the inhabitants of Canada; he will, consequently, give the most precise "and most effectual orders, that his new Roman Catholic subjects may profess the "worship of their religion, according to the rites of the Romish Church, as far as the "laws of Great Britain permit."

To the extent then of the right of the free exercise of their religion the Roman Catholics of Old Canada—the Canada embraced within the provisions of the Treaty of Paris—have the guarantee of a treaty between nations, and to that extent they are not subject to competent interference even from the Imperial Government. It will be noticed, however, that this right is limited in the sense that it only holds good "as far as the laws of Great Britain (up to that time enacted) permit."

The Quebec Act (1774), the first imperial statute as to the government of the colony defined the extent to which "the laws of Great Britain" permitted "the liberty of the Catholic religion" in the following terms (14 George III. Cap. 83, Sec. 5) :—

"* * * Subject may have, hold and enjoy the free exercise of the religion of the "Church of Rome subject to the King's supremacy. * * * And that the clergy of the "said Church may hold, receive and enjoy their accustomed dues and rights, with respect "to such persons only as shall profess the said religion."

One of the "rights" referred to was certainly the superintendence and control of the education of the children of Roman Catholic parentage. That has always been held in all countries and under all circumstances to be one of the especial prerogatives of the clergy of that denomination. In the words of an eminent ecclesiastic of that belief: "education should not and cannot be separated from instruction in the verities of the Christian faith." That it was so understood is apparent from a clause in the Act (1791) granting constitutional government to Lower Canada (31 George III. Cap. 31, Sec. 42), in which it is provided that

"Whenever any Bill shall be passed containing any provisions which shall in any "manner relate to, or affect the enjoyment or exercise of any form, or mode of religious "worship; or shall impose or create any penalties, burdens, disabilities or disqualifica-"tions in respect of the same; or shall in any manner relate to, or affect the payment, "recovery or enjoyment of any of the accustomed dues or rights, etc."

Then the Royal assent was not to be given until thirty days after the Bill should have been laid before the Imperial Parliament; and this delay was to enable the Imperial authorities to decide whether any of the provisions of the Treaty of Paris or The Quebec Act of 1774 had been contravened. There cannot, to our mind, be any question that the "payment" specified had reference to educational dues as well as tithes.

This clause was incorporated in The Union Act (1840) uniting the Provinces of Upper and Lower Canada (3 and 4 Vic. Cap. 35).

After long years of effort the Protestants of Lower Canada succeeded in establishing and having recognized separate or dissentient denominational schools, but no great amount of liberty was allowed these until in 1863 the Separate School Act for Upper Canada, giving to the Roman Catholics of this Province the right of establishing Separate Schools was passed. It will not be disputed that this Act, through which we have our present Ontario Separate School system, was forced upon Upper Canada by the votes and influence of the French Catholic members of Lower Canada. Left to herself, the Western Province would never have allowed or recognized Roman Catholic Separate Schools. Nevertheless, it was but a matter of bargain, of compromise, of give and take, for with equal certainty it can be stated that, left to herself, the Eastern Province would never have allowed or recognized the Protestant dissentient schools. In other words Lower Canada said: "We are willing to admit the right of our Protestant fellow-citizens to educate their children in their own faith and after their own fashion, but in return we demand the guarantee of the same right to the people of our faith in your Province," and for the sake of the Protestants of the lower St. Lawrence the dwellers by the lakes gave way.

This hasty *resume* of events brings us down to the time of Confederation, a most important epoch, by reason of the fact that up to this time all dissentient denominational schools, whether Protestant or Catholic, existed merely by virtue of legislative enactment, and the power that created could at will destroy. All this was shortly to be changed. Meanwhile sight must not be lost of the fact that the Catholic schools of Quebec had being as a consequence of the Treaty of Paris, and were not subject to amendment, even by the Imperial authorities.

CHAPTER II.

THE BRITISH NORTH AMERICA ACT.

THE British North America Act (Canada's Constitutional Act) contains the following section and sub-sections with reference to education:—

"93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.

"(2) All the powers, privileges and duties at the Union by law conferred and "imposed in Upper Canada on the Separate Schools and school trustees of the Queen's "Roman Catholic subjects shall be, and the same are hereby extended to the dissentient "schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

"(3) Where in any Province a system of Separate or dissentient schools exists by law "at the Union, or is thereafter established by the Legislature of the Province, an appeal "shall lie to the Governor-General-in-Council from any act or decision of any Provincial "authority affecting any right or privilege of the Protestant or Roman Catholic "minority of the Queen's subjects in relation to education.

"(4) In case any such Provincial law as from time to time seems to the Governor-"General-in-Council requisite for the due execution of the provisions of this section is not "made, or in case any decision of the Governor-General-in-Council on any appeal under "this section is not duly executed by the proper Provincial authority in that behalf, "then and in every such case, and as far only as the circumstances of each case require, "the Parliament of Canada may make remedial laws for the due execution of the pro-"visions of this section and of any decision of the Governor-General-in-Council under "this section."

It will perhaps, make towards a clear understanding of the matter under consideration to examine with some particularity into the meaning and effect of these clauses, and thereafter into the reasons that led to their adoption and incorporation into the Canadian Constitution.

The main clause (93) relegates, subject to the provisions of the sub-sections following, all matters pertaining to education to the Provincial Legislatures. It may be stated that the Legislature of each Province is a sovereign power within itself in all matters that are by the Constitution assigned as within the jurisdiction of the Province. So that had the reference to education ended with the main clause, every Province would have had absolute power over its schools, excepting that the French Catholics of Quebec would have had, under the Treaty of Paris, no matter what the national character of the population might have become, the right to Roman Catholic schools and the superintendency by the clergy of the Roman Catholic Church over the education given in those schools.

But the first sub-section limits most materially the powers of the Legislatures. No denominational school having existence at the time of the union can be disturbed. It will be well to note the term "denominational school," as that subject will come up again in connection with the Manitoba school case. The meaning of the term "denominational" as applied to schools was well understood by the Imperial Parliament at the time of the passing of the British North America Act. For thirty-six years prior to 1867 a system of national, as distinguished from denominational schools, had existed in Ireland, while on the other hand the system of primary education in England was chiefly denominational, being carried on mainly through the instrumentality of schools in connection with the various denominations.

The power, for instance, of the Legislature of Ontario to deal with educational matters stops short at the system of Roman Catholic Separate Schools as they existed at the time of the union. Amendments as to the regulation of these schools, passed since 1867 may be altered or repealed, the system itself must remain so long as Canada retains its present Constitution.

The second sub-section deals entirely with Ontario and Quebec, confirming generally speaking the system in Ontario, and extending all its powers, rights and privileges to the Protestant minority of Quebec.

The third sub-section is particularly to be noticed because therein lies the root of the whole issue now in contention respecting Manitoba. It provides that after the union if a Province establish through its legislature a system of separate or dissentient schools these schools shall then become a Right—a permanency—as though they had existed before the union; and provision is made for an appeal to the Governor-General-in-Council should a later Provincial authority invade the Right thus created, and in fact against any invasions of Separate and dissentient school rights however created.

The fact seems to be too often lost sight of that if the rights of the Protestant minority in Quebec were impaired by the legislature of that Province, the redress of the minority would have to be sought through an appeal to the Governor-General-in-Council and a remedial order.

It may be contended that in calling the status of the Separate Schools "thereafter established by the Legislature" a "right," the intention of the framers of the Constitution is exceeded, that the claim to consideration thus created is but a privilege, as to which the Governor-General-in-Council may use discretion. This contention is a necessary carollary to the argument founded upon the claim that the Governor-General-in-Council in hearing a case such as the one under discussion is sitting, not as a judicial, but as a political body. We will touch upon that argument later. Meanwhile we will shortly offer evidence that an absolute Right is created in the manner indicated, though perhaps the degree of difference between a right and a privilege under the circumstances is of little moment. A privilege begotten of the law and exercised under the law surely secures all the powers and possesses all the characteristics of a right in an appeal to a body expressly designated to see that neither right nor privilege is affected. Protestant dissentient Schools, as a matter of fact, were not established as a system in Quebec until after the union, yet were an attempt now made to abolish them we would contend for their existence whether as a matter of right or privilege just as emphatically as we support the decision in the New Brunswick school case on the ground that in that Province neither a right nor a privilege had been established.

Sub-section four prescribes the remedy to be applied in case of an appeal to the Governor-General-in-Council being successful. It will be noticed that after the first sub-section there is no further reference to "denominational" schools; thereafter only Protestant and Roman Catholic Separate or dissentient Schools are considered or defined as being within the provisions of the law.

Having now dealt perhaps to a sufficient length with the meaning of Sec. 93 of the B.N.A. Act, let us turn our attention to the reasons that led to such measures being engrafted upon our Constitution. This is an important matter, in that it has a very considerable bearing not only upon the subject under consideration, but upon the semi-religious agitation that as a result is developing in Ontario and Quebec, and to a lesser extent in some of the other Provinces. The confederation of the four original Provinces of the Dominion, the two Canadas, New Brunswick, Nova Scotia, was a matter of treaty between four distinct powers. The Imperial authorities stood ready to give sanction to any agreement that should be arrived at, but the agreement was of necessity a matter of arrangement between the four parties. It is not necessary here to recapitulate the long years of negotiation, the proposals offered and accepted, those offered

and rejected, the arrangements and re-arrangements, the bickerings in our own Legislature and the fears of the Maritime Provinces—they form the history of that time. Like every treaty, except where a conqueror dictates terms to an utterly helpless foe, the terms finally decided upon were in the nature of a compromise. To reconcile interests, factions, prejudices, it was necessary, as it always is and always will be necessary in arrangements of a like nature, for each to give way to the other. The leading men of all parties united to effect this compromise, and that they succeeded as well as they did is a splendid tribute not alone to their patience but to their liberality. We cannot discover however that there was much diversity of opinion as to school matters. The proposition to bestow jurisdiction upon the Provincial Legislature to deal with all matters affecting education, subject only to the proviso relative to denominational schools contained in sub-Section 1 of Sec. 93, B.N.A. Act, seems to have met with general approval save from one source. Had objection not been raised from this source, it is indisputable that Sec. 93 would have had but the first sub-section; that the Legislatures would have had full powers over all matters of education with the single exception of denominational schools in existence at the time of union. So far as Ontario is concerned this would have mattered nothing, the additional sub-sections have had no effect upon this Province; to Quebec it mattered somewhat; to Manitoba it now means a great deal.

The objection came from the Protestants of Quebec and was formally made through their representatives in Parliament. They had their dissentient schools, it is true, and to that extent their rights would have been guarded by sub-section I, but there were many things with which they were not satisfied, many concessions which they had asked and had not received, and they were exceedingly afraid that they would be left too much under the control of the Roman Catholic majority. It must be remembered that the position of the Protestants of Quebec was quite different from the Roman Catholic minority of Ontario. In this Province the Public Schools were at that time non-sectarian, though they are not so now; in Quebec the system was purely Roman Catholic. The Protestant minority, therefore, made two demands as a condition of union: first a guarantee of their educational rights as they then existed, so that the Legislature of Quebec should have no power of interference, and second, that the existing law should be amended before the union, so as to remove certain objections. In a word, the Quebec minority were determined to secure all necessary privileges as a matter of constitutional right, and they went about it in a highly skilful and proper manner. They simply made their demands an ultimatum, nor did the French Catholic representatives offer any serious objection. The matter was promptly brought before the notice of Parliament in 1865, when the articles of Confederation were under discussion. Mr. L. H. Holton, then a leading Protestant representative from Lower Canada, interpellated the Government again and again, and was supported ably by Sir John Rose, Hon. Mr. Sanborn and others. Hon. Mr. Dorion, then chief of the Rouges, Hon. Mr. Laframboise, Hon. D'Arcy McGee, among others intimated acquiesence. Hon. George Brown, the great champion of national schools, in asking full justice for the complainants, referred to the satisfaction the existing system in Upper Canada was giving, and complimented all parties on the frank and conciliatory manner in which the claim had been met. Sir E. P. Tache, the then Premier, promised an act giving full redress of any reasonable grievance, Sir John Macdonald gave a strong support, and Sir George Cartier had no hesitation in saying "it is the intention of the Government that in that law there will be a provision that will secure the Protestant minority in Lower Canada such management

and control over their schools as will satisfy them." In fact, throughout the whole discussion there was hardly a question raised against the protection sought for by the Lower Canadian minority, and the distinct promise was given that before Confederation became an accomplished fact a law should be passed that would meet the views of all.

Before this bill was drafted, however, a calamity befell the Government, in the defeat of the union scheme in New Brunswick, and Parliament had suddenly to prorogue without passing the amended law. Sir George Cartier, Sir A. T. Galt and other leaders, however, promised the Protestant members from Lower Canada that the bill would be passed at the next session. Parliament met in 1866, the bill was introduced, a motion in amendment was made that all similar privileges—one being a separate educational Board or Council for the minority—should be granted the Roman Catholics of Upper Canada. The Protestant members of the upper Province objected on the ground that the circumstances were widely dissimilar, and the Government seeing that they would be defeated had to withdraw the bill. The promise to the Protestants of Lower Canada was not carried out.

The position, as can be imagined, was most awkward. The Protestants of Lower Canada absolutely refused to come into the Union, and without them the Union could not be carried. It was left to that great leader of the French Catholics, Sir George Cartier, to solve the difficulty. He gave to the Protestants his pledge that when Confederation was a fact, and when Quebec had a Legislature of her own, one of the first acts of that Legislature would be to pass the law that had not passed Parliament. Cartier was known as a man who had never broken his word, the pledge was accepted, and it may be remarked, in passing, was amply fulfilled. Sir George himself sought and received election to the first Quebec Legislature, and his promise was carried out in good faith.

But before this the Act of Confederation had to be dealt with. The educational clauses adopted in 1865 (Sec. 93 and Sub-Sec. 1), only safeguarded the rights the minority had at the time of Union. To carry out the promise made to the Protestant minority of Lower Canada, clause two was added, giving them at least all the rights that the Catholic minority of Upper Canada would have; and secondly, to make binding the law that the Quebec Legislature was to pass, clauses three and four, creating a right by legislation passed after the union, with an appeal for redress to the Governor-General-in-Council, and the remedial order arrangements were devised and incorporated.

The right to the free exercise and liberties of their religion, including their schools, stipulated for the Roman Catholics of Quebec in the capitulations of Quebec and Montreal, guaranteed by the Treaty of Paris, defined by the Quebec Act of 1774, reaffirmed in the Constitutional Act of 1791, and the Union Act of 1840, was engrafted in the Constitution of Canada granted in 1867; and in addition thereto, at the request of, and to protect the rights of the Protestants of that Province, further clauses made binding upon the whole Dominion were consented to and were made a matter of treaty between the Provinces, and a part of the Constitution. Right or wrong, good policy or bad, there they are and there they will stay so long as the Constitution lasts.

This must be said; if Separate Schools were forced upon Upper Canada by the French Catholic members in 1863, as undoubtedly they were, the created right of Separate Schools established after the union was forced upon the French Catholics by the Protestants, and in defence of Protestant interests, in 1866, and it is this latter that forms the groundwork for dispute with Manitoba at the present time.

CHAPTER III.

New Brunswick School Case.

The first appeal, under the law, as described in the preceding chapter, came from the Province of New Brunswick. That Province, along with Nova Scotia, presented, at the time of the union, no especial features with regard to educational matters, and was consequently dealt with under the clauses of Sec. 93 of the B.N.A. Act without being in any way particularized. The previous Provincial legislation on educational matters can be dealt with in very small compass.

In 1858 an Act was passed entituled "An Act Respecting Parish Schools." This was the school law of the Colony of New Brunswick, the term "Parish" being used because the local sub-divisions of territory were so named. This corresponded to our phrase of "municipality," and had no other signification whatever. The Act of 1858 provided a Board of Education consisting of the governor and council, a superintendent to be appointed who was to act as secretary, etc., and this Board had practically control of the schools. Among their duties was (Sec. 4, sub-sec. 7) "to provide for the establishment, regulation and government of school libraries and the selection of books to be used therein; but no works of a licentious, vicious or immoral tendency, or hostile to the Christian religion, or works on controversial Theology, shall be admitted."

A provision of importance in the after dispute was that of Sec. 8, sub-sec. 5, which read :—

"Every teacher shall take diligent care, and exert his best endeavours to impress "on the minds of the children committed to his care the principles of christianity, "morality and justice * * * but no pupil shall be required to read or study in or from "any religious book, or join in any act of devotion objected to by his parents or guard-"ians; and the Board of Education shall, by regulation, secure to all children whose "parents or guardians do not object to it, the reading of the Bible in Parish "schools; and the Bible when read in Parish Schools by Roman Catholics children "shall, if required by their parents or guardians, be the Douay version, without note or "comment."

The teachers and districts were to receive a certain pro-rata sum from the Provincial Treasury. Amendments to this act were passed in 1863 and in 1867, but both had relation to the working out of the school system and did not in any way affect its principle. So that at the time of Confederation New Brunswick was under the operation of the "Act respecting Parish Schools" of 1858.

In 1871 the Legislature of New Brunswick passed a measure known as "The Common Schools Act." This Act differed from the Parish Schools Act in some particulars, but the only matters of digression that have bearing upon the present issue, are those in which almost arbitrary powers of assessment were conferred upon the trustees of the school districts, the provision giving the inspector power to appoint trustees with full powers, in case the ratepayers did not or would not act, and that all schools were to

be non-sectarian. The matter of the reading of the Scriptures is not mentioned in the Act of 1871.

As a matter of fact, except as regards compulsory taxation there was no very great difference in principle between the Parish School Act and the Common School Act. The working clauses were precisely the same, the details as to the carrying out of the work thus provided for were the same. The duties and powers of the officers did not substantially differ. Except as to Section 8, heretofore quoted and the non-sectarian clause, there was in reality very little difference in principle between the two measures.

Against this Act of 1871 the Roman Catholic Hierarchy, clergy and laity of the province appealed by petition to the Governor-General praying for disallowance of the same, on the grounds that it would destroy or greatly diminish "the educational privilege which the Roman Catholics enjoyed at the passing of the B.N.A. Act and subsequently;" that under the previous law "Catholics were enabled wherever their numbers were sufficiently large to establish schools in which a good religious and secular education was afforded;" that in the larger centres the petitioners had gone to great expense to erect schools of their own; that in the other districts they were not "compelled to the support of any schools in which they had reason to apprehend that anything] would be done to sap the faith or weaken the religious convictions of their children;" that the Act was not called for or demanded, that all powers were absolutely vested in the majority, that they were thereby compelled to contribute to the support of a school system of which they conscientiously disapproved; and that this was a palpable violation of the spirit of the British North America Act. There was a further contention entered that the petitioners had a prescriptive right in the money grants already made.

Sir John Macdonald was then minister of justice and his report on the bill and the petition was short and to the point. He said:—

"The Act complained of is an act relating to Common Schools, and the Acts repealed "by it apply to parish, grammar or normal schools. No reference is made in "them to separate, dissentient or denominational schools, and the undersigned does not "on examination find that any statute of the Province exists establishing such special "schools."

"It may be that the Act in question may operate unfavorably on the Catholics, or "on other religious denominations, and if so, it is for such religious bodies to appeal to "the Provincial Legislature, which has the sole power to grant redress."

"As, therefore, the Act applies to the whole school system of New Brunswick, and "is not specially applicable to denominational schools, the Governor-General has, in the "opinion of the undersigned, no right to intervene."

As to the money grants Sir John held that no contract existed. Let us digress here for a moment. Certain persons, who should know better, assume to find an analogy between the New Brunswick and Manitoba cases in Sir John Macdonald's report and a clear direction as to what should be done in the latter case in the words "if so, it is for such religious bodies to appeal to the Provincial Legislature, which has the sole power to grant redress." The dishonesty of taking this sentence without its context is so apparent that one is amazed that it should be ventured upon. If the preceding clause in Sir John's report, or anything bearing the same interpretation can be found in any official report or judgment of the Manitoba case, then an analogy would exist.

The question remained as above until the meeting of the Parliament of Canada in 1872. On May 20th Mr. Costigan moved a resolution along the lines of the Roman

Catholic petition before referred to, and praying that His Excellency disallow the Provincial bill at the earliest possible period. The debate lasted many days, several amendments being proposed; the motion finally adopted being an amalgamation of two amendments, one by Mr. Colby and the other by Hon. Alexander Mackenzie:—

"That this House regrets that the School Act recently passed in New Brunswick is "unsatisfactory to a portion of the inhabitants of that Province, and hopes that it may be "so modified during the next session of the Legislature of New Brunswick as to remove "any just grounds of discontent that now exist, and this House deems it expedient that "the opinion of the Law Officers of the Crown in England, and if possible the opinion of "the Judicial Committee of the Privy Council, should be obtained as to the right of the "New Brunswick Legislature to make such changes in the school law, as deprived the "Roman Catholics of the privileges they enjoyed at the time of the union in respect of "religious education in the Common Schools, with the view of ascertaining whether the "case comes within the terms of the 4th sub-section of the 93rd clause of the British "North America Act, 1867, which authorizes the Parliament of Canada to enact remedial "laws for the due execution of the provisions respecting education in the said Act."

That portion of the motion after the words "and this House deems it expedient" was Hon. Mr. Mackenzie's amendment. In order that effect might be given to this resolution a sum of $5,000 to defray expenses was voted.

The Executive Council of New Brunswick replied to the resolution of the Federal Parliament in spirited, one might almost say, indignant terms. They denied absolutely the assumption that the Roman Catholics of the Province had been deprived of any privileges they enjoyed at the time of the union. "No privileges," says the memorandum of the Executive, "are taken away by the Common Schools Act, 1871, except such as were secured by the statutes thereby repealed; and the Executive Council regret that the House of Commons should have assumed a state of facts which should dispense with the necessity of examining the legislation of the Province upon the subject." Proceeding, the memorandum points out that in order to render the law inoperative under the first sub-section of Sec. 93, B.N.A. Act, there must have been at the time of the Union denominational schools in existence under the law, and that no such schools existed. As Separate Schools had not been established subsequent to the Union, none of the clauses of Sec. 93 were applicable. The Parish Schools were clearly schools of the ratepayer and not of the denomination; they existed, not in connection with the denomination, but in connection with the State, and vested no rights or privileges in any class of persons. Clause 5 included the teaching of the principles of Christianity, but not of denominational Christianity, and where, as in the library clause, all works on controversial theology were classed with obscene, vile and infidel works, it could not for a moment be contended that denominational teaching of any kind was contemplated. Even the concession of using the Douay version of the Bible had to be exercised "without note or comment." Surely if distinctive doctrinal teaching was to be allowed, and it it is impossible to conceive of a denominational school without distinctive doctrinal teaching, then the reading of the Douay version with note and comment must have been allowed. Moreover, the Douay version does not profess to be a sectarian book, but the Word of God. This was the ground taken by the executive and they wound up by pressing an appeal to the Privy Council to settle the matter once for all.

In due course all the documents went to the Law Officers of the Crown for an opinion. Their decision was given on Nov. 29th, 1872.

"We agree substantially with the opinion expressed by the Minister of Justice of

"the Dominion. So far as appears before us, whatever may have been the practical "working of annual educational grants in the Province of New Brunswick, the Roman "Catholics of that Province had no such rights, privileges or schools as are the subjects "of enactment in the British North America Act, 1867, Section 93, Sub-Section, *et seqa.*

"It is, of course, quite possible that the new Statute of the Province may work in "practice unfavorably to this or that denomination therein, and therefore to the Roman "Catholics, but we do not think that such a state of things is enough to bring into opera-"tion the restraining powers or the powers of appeal to the Governor-General-in-Council, "and the powers of remedial legislation in the Parliament of the Dominion contained in "the 93rd section. We agree, therefore, in the practical conclusion arrived at by "Sir John A. Macdonald."

Reference was then made to the Judicial Committee of the Privy Council. The Lord President of the Council decided that as the power of disallowance of Provincial enactments rested with the Dominion Government there was nothing in the case that gave Her Majesty-in-Council any jurisdiction.

There being no possibility of further appeal along this line the "Common Schools Act, 1871," of New Brunswick, was duly allowed and went into operation.

Still the dispute was not at an end. The question of disallowance only had been settled. The constitutionality of the Act was next attacked, all parties being agreed as to the reference, and the Dominion Government having voted a sum to pay the costs. This reference was the celebrated Renaud case. Auguste Renaud appealed against his assessment under the Common Schools Act, on the ground that the Legislature had no power or authority to enact the law under which such assessment was levied, inasmuch as it contravened the British North America Act, and was consequently void and of no effect. The action was taken under sub-section I. of Section 93, B.N.A. Act, the contention being that denominational schools existed at the time of the Union. The Court of first instance confirmed the assessment and the case then went to the Supreme Court of New Brunswick. This court unanimously sustained the constitutionality of the Act, on the ground that denominational schools did not exist by law at the time of the Union, that the "Parish Schools Act" was a general educational act for the Province under which the Roman Catholics had no exclusive rights, the reading of the Douay version of the Bible being merely a matter of regulation, and that therefore they had no case under sub-section I. of Sec. 93 of the B.N.A. Act.

The Judicial Committee of the Privy Council upon appeal took the same view. We have not the judgment of the highest court before us, as at that time their lordships' decisions were not printed, but there is no doubt that their lordships' conclusions were reached upon the same grounds as influenced the judgments of the lower courts. This decision ended the dispute.

To sum up briefly, New Brunswick never had denominational or Separate Schools as such under the law, either before or subsequent to confederation, consequently legislation on educational matters of the Provincial Parliament could not and did not come under the influence of the sub-sections of Section 93 of the Act of Confederation. Importance is given this case as being the first to arise after the union.

CHAPTER IV.

Prince Edward Island School Case.

Prince Edward Island was not one of the original parties to the Confederation, having been admitted as a Province in 1873. The Act of Union makes no specification as to education beyond what is contained in the B.N.A. Act. This Province was, however, the second to raise an appeal upon matters of education and to claim the right of Separate Schools. A portion of the population are French Acadians.

Prior to becoming a part of the Dominion, and therefore subject to the provisions of Sec. 93, B.N.A. Act, the school law in force was under the authority of an Act passed in 1868. This Act repealed a measure passed in 1861 which provided a board of education to regulate the admission of teachers and the practice and system of education to be observed. It was required that every teacher should pass an examination by the board of education and receive a certificate of qualification. An exception however was made (Sec. 31) allowing an Acadian (French) teacher, who had not been examined, to teach at a reduced salary if he produced a certificate signed by the clergyman or priest of the district or parish wherein he taught, to the effect that he was capable of teaching and that he had taught the number of scholars required, and had instructed one English class for three months previous to the granting of such certificate. A subsequent section (Sec. 37) however declared that all schools claiming allowance to teachers under the Act wherein the books, regulations and system of education prescribed, or to be prescribed by the school visitors and Board of Education to be observed, were not observed or adopted, should if the board thought fit and make an order to that effect, be refused or deprived of such allowance until such books, regulations and system of education should be observed and adopted. The preamble to this act declared the schools to be free schools. It is therefore clear that up to the repeal of the Act of 1861 there had not been Separate Schools in the island.

By the Act of 1868 a new system of education was introduced and all anterior statutes were repealed. A board of education was established, but no person was allowed to teach without a license from the board, granted after examination. Visitors were appointed for defined districts and each district elected a board of trustees. These trustees had power to assess householders, being parents or guardians of children, for certain current expenses and the building and repairing of school houses, but provision was made that a teacher who could teach French should receive £5 additional salary provided the trustees of such school district raised that sum by supplementary subscription. There are numerous other clauses which with two exceptions need not here encumber the record. The exceptions are:—

"Sec. 103:—The two schools, which were established, and are now in operation in the "district known as Anglo-Rustico district, or township number twenty-four in this "island (one school having been found insufficient to afford the means of education to "all the children therein), shall be continued as now in operation, and the board of educa- "tion are hereby authorized to divide and alter the said district in such way and manner "as they may deem expedient, so as to meet the exigencies of the case, anything herein

"contained to the contrary notwithstanding; provided always, that no teacher appointed "to take charge of any such school or scholars in the said Anglo-Rustico district, shall "at any time be recognized as a district teacher or be entitled to a salary, unless such "person shall have obtained a license as a first or second class teacher from the board of "education, and shall comply with the provisions of this act relating to district teachers."

"Sec. 104: In case any other established school district in this Island shall be "found similarly circumstanced with the said district hereinbefore designated the Anglo-"Rustico district, it shall be in the power of the Board of Education to apply the same "remedy in relation thereto, by dividing and altering the same and establishing an "additional school therein, as is mentioned and set forth in the last preceding section, in "regard to the said Anglo-Rustico district, and with the like restrictions in all respects "as therein prescribed in regard to the teacher of any such additional school, being a "duly licensed teacher, and the trustees of his school shall conform in all respects to the "provisions of this Act."

This Act was again repealed by the Act of 1877, Prince Edward Island at this latter date being a province of the Dominion of Canada. This new measure changed somewhat the personel of the Board of Education, and made many other changes which we need not here notice. Certain pertinent clauses we will transcribe :—

"Sec. 15: No teacher shall receive from the Provincial Treasury the salary herein "provided, according to his respective class or grade, unless the average daily attendance "for the term during which he claims his salary shall be at least fifty per cent. of the "children of school age within the school district, and made so to appear to the chief "superintendent's satisfaction; and if such average daily attendance shall be less than "fifty per cent., a proportionate deduction shall be made from his salary for any "deficiency.

"Sec. 16: In case such deduction shall at any time be made from any teacher's "salary for the reason set forth in the preceding section, the chief superintendent shall "cause the fact and the amount of the deduction to be certified to the trustees of the "district, who shall forhwith npon the receipt thereof levy an assessment upon the parties "in the district who have by neglecting or refusing to send their children to school, caused "the deficiency in average attendance, and such assessment shall be distributed and paid "in such proportions and amounts by such persons as the trustees in their absolute descre-"tion may determine; but should it be proved to the satisfaction of the trustees that "such deficiency was caused by sickness or other unavoidable causes, the trustees shall "in that case be, and they are hereby authorized to levy an assessment on the district to "meet such deduction in such manner as for other school purposes."

All the old school districts were continued, the trustees were given large powers, but were to keep certain conditions with regard to the employment of teachers, and then this :—

"Sec. 92: All schools conducted under the provisions of this Act shall be non-sec-"tarian, and the Bible may be read in all such schools, and is hereby authorized, and "the teachers are hereby required to open school on each school day with the reading of "the sacred Scriptures by those children whose parents or guardians desire it, without "comment, explanation or remark thereupon by the teachers; but no children shall be "required to attend during such reading, as aforesaid, unless desired by their parents or "guardians."

Against this Act Bishop McIntyre of Charlottetown appealed, first to Lieutenant-Governor Sir Robert Hodgson, to withold the bill, and this being denied, to the Governor-General-in-Council, under sub-section 3 of section 93 of the B.N.A. Act. His

Lordship's contention, backed by a memorial with 18,000 signatures, was in short, that the Anglo-Rustico schools, now increased to thirty-one in number, were in fact, Separate Schools, built by the Roman Catholics at their own expense, "where secular teaching became education by being based upon religious instruction"; that the effect of the law would be to compel them to not only support their own schools wholly, but to pay taxes for the general schools; that the effect of clauses 15 and 16 would be to create into a crime, punishable by fine and imprisonment, the desire of Christian parents to give their children Christian instruction; that the Anglo-Rustico schools were, and always had been separate, dissentient and denominational in character; that in these schools the books were and had been similar to those used in the Roman Catholic schools in the Province of Quebec; that it was and had been prior to Confederation the legally recognized right for the Roman Catholic priest in whose parish they were situated to attend each as frequently as he deemed necessary to hear the children in Catechism and to instruct them in the verities of the Roman Catholic faith; and that the phrase in the Act of 1868, "shall be continued as now in operation," legalized them as Separate Schools.

The Executive Council of Prince Edward Island met and gave prompt reply to the petitions, memorandums and memorials of Bishop McIntyre and those who were supporting him in his claim for Separate Schools. His Lordship's first communication to Sir Robert Hodgson, bears date April 17th, 1877, his last memorial addressed to Lord Dufferin, 20th June, 1877, and the Executive made its deliverance on the 30th of the same month. The Council emphatically denied the statements in the memorials in so far as they asserted the existence of any separate denominational schools, recognized by law or supported at the public expense. They admitted that in the French schools as well as in the Scotch and Irish schools, books had been used that were not authorized by the Educational Board; but affirmed, what was quite true, that no legal authority existed for their use, and pointed out that an evasion of the law, even if successfully carried out for years, could not change the law or the rights of any parties under it. Regarding Sections 15 and 16, they showed that the same principle of deducting a ratio of salary where the daily attendance was not up to the standard, was to be found in the School Acts of 1854, 1860, 1861, 1863 and 1868, and that the only change lay in the simple fact that the deduction from the teacher's salary, made because of the deficiency in the average attendance, was to be levied upon those who wilfully caused the deficiency. They drew attention to the fact that sub-section M. of Sec. 93 was expressly inserted to meet those cases where any denomination of Christians, Roman Catholic or Protestant, had erected a school of their own and to enable such school to participate in the public expenditure, provided it conformed in all respects to the public schools' rules and regulations during school hours; a procedure that had been found to work with excellent results in New Brunswick. As to the Anglo-Rustico schools being legally recognized separate schools prior to Confederation, they absolutely destroyed this contention by producing a petition presented to the Legislature in 1875, signed by Bishop McIntyre and some 9,000 Roman Catholics, of which number nearly 2,000 were French Acadians, praying a concession of the very privileges as to Separate Schools, which in 1877, it was claimed, had legally existed for years prior to 1868. The further statements of the Executive dealing with the formation of the Anglo-Rustico district we need not repeat here, the Acts which we have quoted interpret themselves. Reference may, however, be made to the fact not heretofore recorded in these columns, that by an amendment to the Act of 1861, passed in 1863,

the Acadian teachers as a separate class were abolished, and the powers of the priests to grant certificates and visit the schools for the purpose of giving religious instruction were revoked. It was overlooking this amendment of 1863 that led His Lordship into the error of supposing that the privileges existing in 1861 continued "in operation" until Confederation.

This minute of the Executive was transmitted to Ottawa, was referred to Bishop McIntyre, who made reply in two memorandums, and on the 8th November of the same year the Minister of Justice, Hon. R. Laflamme, made his report. This document is somewhat voluminous, but the substance can be condensed into very close compass. The Minister says: "Upon a close examination it is impossible to arrive at the conclusion that these schools were denominational by law, whatever may have been the course of instruction carried on in them. I find no provision of the law which could be interpreted as warranting the exemption of these schools from the enactment applying to the schools generally." He further found it "impossible" to discover in clauses 103 and 104 anything that would "justify the claim of the Bishop to secure the right to denominational teaching in such schools."

Upon this report the Governor-General-in-Council refused an appeal and allowed the bill.

No comment is needed upon the recital of facts as above set forth. In a word, Prince Edward Island, it is clearly shown, did not have denominational schools established by law at the time of her union with Canada, did not thereafter establish Separate Schools by legislation of the Province, consequently no appeal could lie to the Governor-General-in-Council, as no rights had been acquired that could be affected.

CHAPTER V.

MANITOBA DOWN TO THE UNION.

MANITOBA forms part of what was known as Rupert's Land, and Rupert's Land was the territory granted in the reign of Charles II. to the Hudson Bay Company, in which Prince Rupert was one of the principal grantees. There was a portion of Rupert's Land which had been purchased by Lord Selkirk, in the early part of the present century, which had been settled by him, and which was repurchased by the Hudson Bay Company and formed the district of Assiniboia, a district on the Red River. This was the more settled part of Rupert's Land. The territory of Rupert's Land was part of the territory of the Crown; it formed part of the British Empire, but it was governed and laws were exclusively made for it by the Hudson Bay Company. That Company appointed the Governor. There was no elective representative legislature. The Company appointed certain persons as a legislative council and that council made ordinances. All legislation was necessarily subject to the legislation of the Imperial Parliament, but the only local legislative authority was such as has been described.

Down to the union there was no legislation of any sort or kind with regard to education. There were Roman Catholics in the territory and there were Protestants of

various denominations, chiefly Presbyterians and Anglicans. The different churches and denominations maintained their own schools where they had sufficient strength to do so, but they were purely voluntary schools supported by contributions and fees, and under no legislative authority whatever. The only right or privilege that existed was that of each denomination maintaining their own private voluntary schools at their own expense.

The Hudson Bay Company supplemented the funds of these schools by occasional grants. For instance in 1851, "to weaken the mischevious and destructive energy of those violent and untamed qualities of human nature, which so frequently manifest themselves in society, in a half civilized state, and to strengthen the feelings of honorable independence, to encourage habits of industry, sobriety and economy," it was moved and unanimously carried "that £100 be granted from the public fund to be divided equally between the bishop of Rupert's Land and the bishop of North-West, to be applied by them at their discretion for the purposes of education." This was considerable of a preamble for a not very large grant, but no doubt the money was welcome. At any rate the Presbyterians of Frog Plain put in a petition for £15 on the ground that they had not received anything from the Bishop of Rupert's Land. This was granted at the next meeting of Council, and then a plea for £15 more for the Bishop of St. Boniface to even things up was put in, and this was likewise granted. It cannot be contended however, that these grants from the funds of the Hudson Bay Company were other than voluntary contributions, and the resolutions granting them did not partake in any way of the binding character of legislative enactment upon either the giver or the receiver. This was the condition of affairs down to the union.

To a complete understanding of the Manitoba School case we have now to consider with some particularity the various steps taken with reference to the union and the causes which led to the agreement which was arrived at and which was embodied in the Act of Union. And first, it must be on no occasion lost sight of, that until the 15th day of July, 1870, the Canadian Government had no more right to exercise jurisdiction beyond the western boundary of Ontario than had the Akoond of Swat. The territory was as independent of Canada as was Patagonia, and was at perfect liberty to come into the union or stay out of it. It could set up as an independent Crown colony, it could decide to remain a territory governed by an executive officer appointed by the Imperial Government, or it could throw in its lot with the Dominion. True, Canada had made a settlement with the Hudson Bay Company and had arrived at an understanding of the money payment necessary to extinguish the Company's rights, but these were trading rights, not rights to the title in the land. True also, Canada was in negotiation for the acquisition of these territories, but the negotiation had to be conducted with the people of the territory, as the Imperial Government had emphatically and peremptorily refused to allow the settlers to be coerced into union.

The union was a treaty between the Government of Canada and the settlers on the Red River. It was so designated and was so in fact.

The disturbed times of 1869-70 are matters of history. We need refer to them only as they have bearing upon the subject at issue. At that time the population on the Red River amounted to some 12,000 souls, composed of 2,000 whites, 5,000 English half-breeds and 5,000 French half-breeds. They were about equally divided as between the Protestant and Roman Catholic religions. The French were however the first to move in the matter of resisting any encroachment upon what they considered their rights,

but on November 6th, 1869, a notice was published asking the English to elect twelve representatives to meet twelve already elected French delegates in order to form a Council "to consider the present political state of the country, and to adopt such measures as may be deemed best for the future welfare of the same." Elections were accordingly held, and twelve representatives, two from Winnipeg and one each from the other ten districts were chosen. Two of these twelve had been former members of the Council of Assiniboia, while all were leading men. The twenty-four delegates met on November 16th and sat for five days. The French members proposed the establishment of a Provisional Government "for the purpose of treating with Canada for the future government of the country." The English representatives had not been instructed by their constituents upon this point and an adjournment was taken until December 1st. On that date the Council reassembled and agreed upon the first Bill of Rights. The bill and the action taken upon it were as follows, as reported in the minutes of the Council:—

LIST OF RIGHTS.

"1. That the people have the right to elect their own Legislature."

"2. That the Legislature have power to pass all laws local to the territory over "the veto of the Executive by a two-thirds vote."

"3. That no Act of the Dominion Parliament (local to the Territory) be binding "on the people until sanctioned by the Legislature of the Territory."

"4. That all sheriffs, magistrates, constables, school commissioners, etc., etc., be "elected by the people."

"5. A free homestead and pre-emption land law."

"6. That a portion of the public lands be appropriated to the benefit of schools, "the building of bridges, roads, and public buildings."

"7. That it be guaranteed to connect Winnipeg by rail with the nearest line of "railroad within a term of five years; the land grant to be subject to the Local Legis- "lature."

"8. That for a term of four years, all military, civil, and municipal expenses be "paid out of the Dominion funds."

"9. That the military be composed of the inhabitants now existing in the Terri- "tory."

"10. That the English and French languages be common in the Legislature and "Courts; and all public documents and Acts of Legislature be published in both langu- "ages."

"11. That the judge of the Supreme Court speak the English and French langu- "ages."

"12. That the treaties be concluded and ratified between the Dominion Govern- "ment and the several tribes of Indians in the Territory, to ensure peace on the frontier."

"13. That we have a fair and full representation in the Canadian Parliament."

"14. That all privileges, customs and usages existing at the time of transfer be "respected."

"All the above articles have been severally discussed, and adopted by the French "and English representatives, *without a dissenting voice*, as the conditions upon which "the people of Rupert's Land enter into Confederation. The French representives then "proposed, in order to secure the above rights, that a delegation be appointed, and sent "to Pembina, to see Mr. McDougall, and ask him if he could guarantee these rights by "virtue of his commission, and if he *could do so, that then the French people would join, "to a man, to escort Mr. McDougall to his government seat.* But on the contrary, if Mr. "McDougall could not guarantee such rights, that the delegates request him to remain "where he is, or return till the rights be guaranteed by Act of Canadian Parliament."

"The English representatives refused to appoint delegates to go to Pembina to con-
"sult with Mr. McDougall, stating they had no authority to do so from their constituents,
"upon which the Council dissolved."

"The meeting at which the above resolutions were adopted, was held at Fort Garry,
"on Wednesday, December 1st, 1869."

It will thus be seen that the representatives of both nationalities were agreed as to their demands but that the English refused to adopt a policy of resistance pending the discussion of these demands. In the eye of the law all this was irregular and illegal, but at that time there was no law in the territory, the union had not taken place, and the people were doing what they thought was best for themselves.

Meanwhile Riel's rebellion had prevented the entrance of Hon. William McDougall into the territory as Lieutenant-Governor, a place where as Lieutenant-Governor he had as much right as though he were laying claim to the possessions of the Grand Khan. The Canadian Government took the wise course of sending three commissioners to the Red River to allay the apprehensions of the settlers and explain their policy. The commissioners were Very Rev. Grand Vicar Thibault, Col. de Salaberry and Mr. (now Sir) Donald A. Smith, the present member for Montreal Centre. The latter's fitness for the position none will question. The commissioners reached Fort Garry on the 26th and 27th December. Sir Donald took the ground at once of refusing to recognize the legality of the "Provisional Government," as the Council was called, stating that his commission, as indeed it was, was to the people of Red River. Riel was very distrustful of Sir Donald, but the latter had not served half-a-century in the employ of the Hudson Bay Company without knowing the people he had to deal with. He remained quietly firm and had his way. A mass-meeting of the settlers was called for and held on January 19th. The assemblage was so great that it had to be held in the open air, and though the thermometer registered 20 degrees below zero the meeting lasted five hours. Sir Donald read and explained his commission, and it was decided to elect twenty English and twenty French representatives "with the object of considering the subject of Mr. Smith's commission, and to decide what would be best for the welfare of the country." The Bishop of Rupert's Land and Judge Black were two of the most active participants in the meeting.

The forty representatives were elected accordingly, and met on January 26th, Judge Black being elected chairman. The Forty remained in session until February 11th. Sir Donald delivered an address at the opening session, and on February 8th he again appeared before the Council to discuss their second Bill of Rights. Finally Father Thibault and Sir Donald invited the Council to send delegates to Canada with power to negotiate. Sir Donald's words may be quoted :—

"I have now on the part of the Dominion Government, and as authorized by them,
"to invite a delegation of the residents of Red River to meet, and confer with them, at
"Ottawa. A delegation of two or more of the residents of Red River, as they may
"think best; the delegation to confer with the Government and Legislature, and ex-
"plain the wants and wishes of the Red River people, as well as to discuss and arrange
"for the representation of the country in Parliament."

It was decided unanimously to accept the invitation, and Rev. Father Richot, Judge Black and Alfred H. Scott were appointed delegates. The Provisional Government was continued with Riel as President, and a general election was ordered, to elect twenty-four representatives to a new Assembly.

The expedition from the Portage, under Major Boulton, delayed further progress for a time, and following this came the atrocious murder of Scott—for it cannot be called anything else— which ultimately led to Riel's downfall, caused still further loss of time. Meanwhile the elections had been held and the Assembly constituted. The first meeting was held March 9th, 1870, and terminated March 26th. The executive had in the meantime, discussed and rearranged the basis of negotiation, and when the delegates set off on March 23rd they carried with them an entirely new list of rights. And this brings us to a matter of deep controversy, and one held to be of moment, in relation to the educational question.

There were altogether four Bills of Rights, numbered for convenience, 1, 2, 3 and 4. Nos. 3 and 4 only have bearing upon the present controversy. The issue is, did the delegates carry to Ottawa No. 3 or No. 4? That the matter may be fully understood, we append the two documents in parallel columns :—

No. 3.	No. 4.
"1. That the territories heretofore "known as Rupert's Land and North- "West shall not enter into the Confedera- "tion, except as a province, to be styled "and known as the Province of Assini- "boia, and with all the rights and privileges "common to different Provinces of the Do- "minion.	"1. That the territory of the North- "West enter into Confederation of the "Dominion of Canada as a province, with "all the privileges common with all the "different Provinces in the Dominion. "That this province be governed : "1. By a Lieut.-Governor, appointed "by the Governor-General of Can- "ada. "2. By a Senate. "3. By a Legislature chosen by the "people with a responsible Ministry.
"2. That we have two representatives "in the Senate, and four in the House of "Commons of Canada, until such time as "an increase of population entitles the "province to a greater representation.	"2. That, until such time as the increase "of population in this country entitles us "to a greater number, we have two repre- "sentatives in the Senate, and four in the "House of Commons of Canada.
"3. That the Province of Assiniboia "shall not be held liable at any time, for "any portion of the public debt of the "Dominion contracted before the date the "said province shall have entered the Con- "federation, unless the said province shall "have first received from the Dominion "the full amount for which the said pro- "vince is to be held liable.	"3. That in entering the Confederation, "the Province of the North-West be com- "pletely free from the public debt of Can- "ada; and if called upon to assume a part "of the said debt of Canada, that it be "only after having received from Canada "the same amount for which the said Pro- "vince of the North-West should be held "responsible.
"4. That the sum of $80,000 be paid "annually by the Dominion Government "to the Legislature of the province.	"4. That the annual sum of $80,000 be "allotted by the Dominion of Canada to "the Legislature of the Provinces of the "North-West.
"5. That all properties, rights and "privileges enjoyed by the people of this "province up to the date of our entering "into the Confederation be respected, and	"5. That all properties, rights and privi- "leges enjoyed by us up to this day be re- "spected, and that the recognition and "settlement of customs, usages and privi-

"that the arrangement and confirmation "of all customs, usages and privileges be "left exclusively to the Local Legislature.

"6. That during the term of five years "the Province of Assiniboia shall not be "subject to any direct taxation, except "such as might be imposed by the Local "Legislature for municipal or local pur- "poses.

"7. That a sum equal to eighty cents "per head of the population of this pro- "vince be paid annually by the Canadian "Government to the Local Legislature of "the said province, until such time as the "said population shall have increased to "600,000.

"8. That the Local Legislature shall "have the right to determine the qualifi- "cations of members to represent this pro- "vince in the Parliament of Canada, and "in the Local Legislature.

"9. That in this province, with the ex- "ception of uncivilized and unsettled "Indians, every male native citizen who "has attained the age of twenty-one years; "and every foreigner being a British sub- "ject, who has attained the same, and who "has resided three years in the Province, "and is a householder; and every for- "eigner, other than a British subject, who "has resided here during the same period, "being a householder, and having taken "the oath of allegiance shall be entitled to "vote at the election of members for the "Local Legislature and for the Canadian "Parliament. It being understood that "this article be subject to amendment ex- "clusively by the Local Legislature.

"10. That the bargain of the Hudson's "Bay Company in respect to the transfer "of the government of this country to the "Dominion of Canada be annulled so far as "it interferes with the people of Assini- "boia, and so far as it would affect our "future relations with Canada.

"11. That the Local Legislature of the "Province of Assiniboia shall have full "control over all the public lands of the "province, and the right to annul all acts "or arrangements made or entered into "with reference to the public lands of "Rupert's Land and the North-West, now "called the Province of Assiniboia.

"12. That the Government of Canada "appoint a commission of engineers to ex-

"leges be left exclusively to the decision of "the Local Legislature.

"6. That this country be submitted to "no direct taxation except such as may be "imposed by the Local Legislature for "municipal and other local purposes.

"7. That the schools be separate, and "that the public money for schools be "distributed among the different religious "denominations in proportion to their re- "spective population according to the "system of the Province of Quebec.

"8. That the determination of the "qualifications of members for the Par- "liament of the Province, or for the Par- "liament of Canada be left to the Local "Legislature.

"9. That in this province, with the ex- "ception of the Indians who are neither "civilized, nor settled, every man having "attained the age of twenty-one years, and "every foreigner being a British subject, "after having resided three years in this "country, and being possessed of a house, "be entitled to vote at the elections for the "members of the Local Legislature, and of "the Canadian Parliament, and that every "foreigner other than a British subject, hav- "ing resided here during the same period, "and being proprietor of a house, be like- "wise entitled to vote on condition of "taking the oath of allegiance.

"10. That the bargain of the Hudson's "Bay Company with respect to the trans- "fer of government of this country to the "Dominion of Canada, never have in any "case an effect prejudicial to the rights of "the North-West.

"11. That the Local Legislature of "this province have full control over all "the lands in the North-West.

"12. That a commission of engineers "appointed by Canada, explore the vari-

"plore the various districts of the Province "of Assiniboia, and to lay before the Local "Legislature a report of the mineral "wealth of the province within five years "from the date of entering into confed- "eration.

"13. That treaties be concluded be- "tween Canada and the different Indian "tribes of the Province of Assiniboia, by "and with the advice and co-operation of "the Local Legislature of this province.

"14. That an uninterrupted steam com- "munication from Lake Superior to Fort "Garry be guaranteed to be completed "within the space of five years.

"15. That all public buildings, bridges, "roads, and other public works, be at the "cost of the Dominion Treasury.

"16. That the English and French lan- "guages be common in the Legislature, "and in the courts, and that all public "documents, as well as all the Acts of the "Legislature, be published in both lan- "guages.

"17. That whereas the French and "English-speaking people of Assiniboia "are so equally divided in numbers, yet so "united in their interests, and so connected "by commerce, family connections, and "other political and social relations, that "it has happily been found impossible to "bring them into hostile collision, although "repeated attempts have been made by "designing strangers, for reasons known "to themselves, to bring about so ruinous "and disastrous an event.

"And whereas, after all the trouble and "apparent dissensions of the past, the re- "sult of misunderstanding among them- "selves, they have, as soon as the evil "agencies referred to above were removed, "become as united and friendly as ever; "therefore, as a means to strengthen this "union and friendly feeling among all "classes, we deem it expedient and advis- "able;

"That the Lieutenant-Governor who "may be appointed for the Province of "Assiniboia, should be familiar with both "the English and French languages.

"ous districts of the North-West, and lay "before the Local Legislature, within the "space of five years, a report of the miner- "als of the country.

"13. That treaties be concluded between "Canada and the different Indian tribes of "the North-West, at the request and with "the co-operation of the Local Legislature.

"14. That an uninterrupted steam "communication from Lake Superior to "Fort Garry be guaranteed to be com- "pleted within the space of five years, as "well as the construction of a railroad "connecting the American railway, as soon "as the latter reaches the international "boundary.

"15. That all public buildings and con- "structions be at the cost of the Canadian "exchequer.

"16. That both the English and French "languages be common in the Legislature, "and in the Courts; and that all public "documents, as well as the Acts of the "Legislature, be published in both lan- "guages.

"17. That the Lieutenant-Governor to be "appointed for the Provinces of the North- "West be familiar with both the English "and French languages.

"18. That the judge of the Superior "Court speak the English and French "languages.

"19. That all debts contracted by the "Provincial Government of the Territory "of the North-West, now called Assiniboia, "in consequence of the illegal and incon- "siderate measures adopted by Canadian "officials to bring about a civil war in our "midst, be paid out of the Dominion "Treasury, and that none of the members "of the Provisional Government, or any "of those acting under them, be in any "way held liable, or responsible, with re- "gard to the movement or any of the "actions which led to the present negotia- "tions.

"20. That in view of the present ex- "ceptional position of Assiniboia, duties "upon goods imported into the province "shall, except in the case of spiritous "liquors, continue as at present for at least "three years from the date of our entering "the confederation, and for such further "time as may elapse until there be unin- "terrupted railroad communication be- "tween Winnipeg and St. Paul, and also "steam communication between Winnipeg "and Lake Superior."

"18. That the Judge of the Supreme "Court speak the English and French "languages.

"19. *The same.*

"20. *The same.*"

It will be seen that list 4 provides for denominational schools, list 3 makes no mention thereof, and it is contended that according to which list is genuine the basis of the Manitoba Act can be defined. Certainly the evidence is very conflicting and at this juncture it seems impossible to decide which was the authentic list. On the one hand the "official copy" found among the papers of Mr. Thomas Bunn, secretary of the Provisional Government is list No. 3. Mr. Begg in his history gives list No. 3, and Governor-General Sir John Young forwarded list No. 3 to the Imperial Government as a copy of the terms brought by the delegates from the Red River. Conversely, Father Richot undoubtedly took list No. 4 to Ottawa, and it was there used as the basis of the conference. This is substantiated under oath. The Ottawa authorities always accepted list No. 4 as authentic, and it is printed in the Canadian Government returns and was filed at the trial of Lepine in 1874 as the authentic list. It has been in the archives of the department of Justice since that time. There is internal evidence too that list No. 4 was the actual basis of negotiation. If list No. 3 was used, why was the name changed from Assiniboia to Manitoba; why was a Senate granted, objected to as it was on the ground of expense? Probably the view adopted by Judge Fournier of the Supreme Court, that No. 3 was the original draft, and No. 4 the finally corrected instrument is the true one, though why Secretary Bunn should not have known of this is no easy of explanation.

We confess to not attaching a great deal of importance to this issue. On the face of it, not what was desired but what was done is of importance. List No. 4 had exis-

tence in fact, was presented at the Ottawa conference, and was used as a basis of negotiation. So that whether separate schools were or were not demanded by the Provisional Government the people of Canada thought they were; and the Provisional Government subsequently assented to them. But aside from all this, even if list No. 4 had never appeared it would have made no difference.

It was Sir John Macdonald and not the Red River delegates who decided as to the educational system for Manitoba, and for a reason that shall appear at the proper time.

The balance of the story is soon told. The Red River delegates arrived in Ottawa, and there met Sir John Macdonald and Sir George Cartier, appointed by the Canadian Government to confer with them. The conference lasted from 23rd of April to the 2nd of May. An agreement was arrived at, and on the latter day Sir John Macdonald introduced into the House of Commons the result of the negotiations in the form of a bill which ten days later became The Manitoba Act. There was a short discussion on the education clauses as follows:—

"MR. OLIVER moved in the amendment that the education clause be struck out.

"HON. MR. CHAUVEAU hoped that the amendment would not be carried. It was "desirable to protect the minority in Manitoba from the great evil of religious dissension "on education. There could be no better model to follow in that case than the Union "Act, which gave full protection to minorities. It was impossible to say who would "form a majority there, Protestants or Catholics. If the population were to come from "over the seas then the Protestants would be in the majority. If, as had been asserted, "Manitoba was to be a French preserve, then the Catholics would be a majority. He "did not care which, because he desired only to see the new province freed from discus- "sions which had done so much injury in the old provinces of Canada. They presented "a problem to the whole world, and the question was, could two Christian bodies almost "equally balanced be held together under the British Constitution. He believed that "problem could be worked out successfully.

"HON. MR. MCDOUGALL said the effect of the clause if not struck out, would be "to fix laws which the Local Legislature could not alter in future, and that it would be "better to leave the matter to local authorities to decide as in the other provinces. *He "quite agreed with his hon. friend in giving the same powers to this province as the others,* "and it was for that reason that he desired to strike out the clause.

"HON. MR. MCKENZIE was prepared to leave the matter to be settled exclusively "by the Local Legislature. *The B.N.A. Act gave all the protection necessary for minor- "ities,* and local authorities understood their own local wants better than the general "legislature. It was his earnest desire to avoid introducing into the new province those "detrimental discussions which had operated so unhappily on their own country, and there- "fore hoped that the amendment would be carried.

After a long discussion a division was taken on the amendment, which was lost by 34 yeas to 81 nays.

Rev. Father Richot reached Fort Garry on June 17th, and on the 24th a special session of the Assembly was held to hear his report. He produced a copy of The Manitoba Act, which he explained at length. The new Constitution was accepted unanimously without discussion; it was decided to welcome the new Lieut.-Governor on his arrival, and so ended the Provisional Government, and so Manitoba entered the union.

We apprehend that no argument is necessary to sustain the position that the entry of Manitoba into the Dominion was the result of a formal treaty between the Red River

settlers and Canada—a treaty invited by Canada—participated in equally by both peoples and ratified by the existing Governments on both sides. This treaty has all the binding force of any treaty between any two other peoples.

CHAPTER VI.

MANITOBA SCHOOL LAWS.

THE Manitoba Act of 1870 created a certain territory into a Province of Canada and conferred a constitution upon that Province. The general basis of this constitution was the British North America Act, and in section 2 of The Manitoba Act it is expressly set out that unless where otherwise specifically provided the Imperial Act shall be applicable to Manitoba. The section reads:—

"The provisions of the B.N.A. Act, 1867, shall, except those parts thereof which "are in terms made, or, by reasonable intendment, may be held to be specially applicable "to, or only to affect one or more, but not the whole of the provinces of the Dominion, "and except in so far as the same may be varied by this Act, be applicable to the Pro- "vince of Manitoba in the same way, and to the like extent, as they apply to the several "Provinces of Canada, and as if the Province of Manitoba had been one of the provinces "originally united by the said Act."

Therefore it follows that all provisions of the British North America Act, not designed and expressed to meet special cases in particular provinces, and not otherwise dealt with in The Manitoba Act, became a part of the constitution of Manitoba just as though Manitoba had been one of the Provinces originally confederated.

The clauses in the two acts relating to education differ somewhat, and that the points of difference may be clearly appreciated we subjoin the provisions of each act in parallel columns.

BRITISH NORTH AMERICA ACT.	MANITOBA ACT.
"93. In and for each province the Legis- "lature may exclusively make laws in re- "lation to education, subject and according "to the following provisions:	"22. In and for the province the said "legislature may exclusively make laws "in relation to education, subject and ac- "cording to the following provisions:—
"(1). Nothing in any such law shall pre- "judicially affect any right or privilege "with respect to denominational schools "which any class of persons have by law "in the province at the union.	"(1). Nothing in any such law shall pre- "judicially affect any right or privilege "with respect to denominational schools "which any class of persons have by law "*or practice* in the province at the union.
"(2). *All the powers, privileges and* "*duties at the union by law conferred and*	

British North America Act.	Manitoba Act.
"*imposed in Upper Canada on the separate* "*schools and school trustees of the Queen's* "*Roman Catholic subjects shall be and the* "*same are hereby extended to the dissentient* "*schools of the Queen's Protestant and* "*Roman Catholic subjects in Quebec.*	
"(3). *Where in any province a system of* "*separate or dissentient schools exists by law* "*at the union, or is thereafter established by* "*the legislature of the province*, an appeal "shall lie to the Governor-General in "Council from any act or decision of any "provincial authority affecting any right "or privilege of the Protestant or Roman "Catholic minority of the Queen's subjects "in relation to education.	"(2). An appeal shall lie to the Govern-"or-General in Council from any act or "decision *of the Legislature of the Province*, "or of any provincial authority, affecting "any right or privilege of the Protestant "or Roman Catholic minority of the "Queen's subjects in relation to Education.
"(4). In case any such provincial law as "from time to time seems to the Governor-"General in Council requisite for the due "execution of the provisions of this section "is not made, or in case any decision of the "Governor General in Council on any ap-"peal under this section, is not duly ex-"ecuted by the proper Provincial authority "in that behalf, then and in every such "case, and so far only as the circum-"stances of each case require, the Parlia-"ment of Canada may make remedial laws "for the due execution of the provisions of "this section and of any decision of the "Governor-General in Council under this "section.	"(3). In case any such Provincial Law "as from time to time seems to the Govern-"or-General in Council requisite for the "due execution of the provisions of this "section is not made, or in case any deci-"sion of the Governor-General in Council "on any appeal under this section is not "duly executed by the proper Provincial "Authority in that behalf, then and in "every such case, and as far only as the "circumstances of each case require, the "Parliament of Canada may make remedial "Laws for the due execution of the pro-"visions of this section, and of any decision "of the Governor-General in Council "under this section.

(The italics show where the two acts differ.)

Why the difference in the two enactments? The question is one of considerable moment in the discussion, for thereby we discover the intent of the law, and some reasons why reference of disputed cases not coming within the ordinary jurisdiction of the Courts are referred for final settlement to a popular or political body. The reasons that led to the change of wording in the Manitoba Act have much to do with the rights of the minority now in that Province. Therefore we will approach this phase of the question with much care.

It is quite evident that there was no intention of leaving matters educational just where they stood under the B.N.A. Act. Had that been desired there would have been no section 22 in the Manitoba Act, because all of the provisions of section 93, except sub-section 2 of the B.N.A. Act, would have applied, and the exception is not available in any case. Then, did the changes contemplate limiting or extending the guarantee to the minority; was the intent to fix more firmly the right to separate or denominational schools, or to leave the question so open that the enacting clauses might, upon test, become inoperative?

The evidence to hand is so clear that unless the question had been raised by high authority we would not have deemed it possible that there was ground for contention. Remember, we are now speaking of the intent, not of what was done, for it not infrequently happens that the framers of a law succeed in producing something quite different from what they had desired. The intent in introducing the words "or practice" in the first sub-section was to confirm as a right the denominational schools as they existed prior to the union. These schools could not exist "by law" because at that time there was no law, and no governing body capable of passing such a law. Without a further specification denominational schools could not be said to exist under sub-section 1 of the B.N.A. Act. Consequently the clause was re-enacted in The Manitoba Act with the addition of the words "or practice," which was deemed sufficient to cover the case.

Sub-section 2 of the B.N.A. Act relates specially to the Provinces of Ontario and Quebec, and, consequently, had no place in The Manitoba Act.

The first part of sub-section 3 of the Imperial Act was deemed sufficient, but a change was desired in the settlement of grounds for an appeal, and for this reason. The question had already been mooted whether the words "act or decision of a Provincial Authority" did not merely point to matters of administration, as, for instance, to the acts of the executive or of the Boards of Education. This point was, in fact, afterwards raised in the New Brunswick case. It was to set at rest any doubt whatever that the acts "of the legislature of the Province" were specially included, so that in the Educational Laws, which it was known would be immediately passed, the rights of minorities would be fully protected. This rendered it necessary to re-enact clause 4 of the B.N.A. Act, which, therefore, became clause 3 of The Manitoba Act.

That we have not given a wrong interpretation of the "Intent" can be amply proven. The delegates from the Red River asked for Separate Schools, and their demand was acceded to. As we have shown in a previous chapter, Parliament, after discussion, passed the bill fully understanding that denominational or separate schools were to be established and protected for all time to come. If Mr. Oliver's amendment had carried the effect would have been that the provisions of The Confederation Act would have applied to Manitoba. The bill as drawn was insisted upon because the design was to make the position of the future religious minority stronger even than under the Confederation Act. The Red River settlers accepted the bill believing that minority rights were fully protected, and the compact between the two peoples was entered into on that understanding. To take any other position is to accuse the Canadian Parliament of monumental duplicity, and the Red River representatives of incredible stupidity.

But the case does not end even here. Sir John Macdonald framed that bill. Sir George Cartier was associated with him, but Sir John was the actual designer of the measure. At that time it was the generally accepted opinion that the new province would become what was popularly called "a French preserve." In other words, it was thought, and we doubt not was intended, by the French leaders, that the surplus, or rather it might be called the "moving" French Canadian population, would trend westward, and that upon the banks of the Red River would be built up a second Quebec, where would be perpetuated the French language and the Roman Catholic religion, developing the riches of the soil, building up the wealth of the Dominion, living under

the free and just laws of the Confederacy yet protected in the enjoyment of what they consider essential to their welfare and happiness, at peace with their neighbors, loyal to the Crown and contributing their share towards placing Canada in her place among the nations of the earth. This certainly was a hope of His Grace of St. Boniface. Unfortunately, the "moving" population of Quebec turned from the farm to the town, from tilling the soil to manufacturing pursuits—unfortunately, we say, because any patriotic Canadian would surely prefer to see our French countrymen making fruitful our western prairies, rather than sweating in the cotton mills and shoe factories of New England. Sir John believed in the theory of the French preserve, and in this view, forseeing in the future a Protestant minority so weak as to be absolutely helpless, determined that their rights should be protected beyond peradventure, and it was for this reason and to this end that the Manitoba Act reads as it does. We speak positively as to this matter for the good and sufficient reason that the writer had the statement above made from Sir John Macdonald himself. Sir John has also left on record his unqualified opinion of the effect of the educational clauses in the following letter addressed to a member of the Manitoba Legislature in November, 1889:—

"You ask me for advice as to the course you should take upon the vexed question "of Separate Schools in your province. There is, it seems to me, but one course open to "you. By the Manitoba Act, the provisions of the B.N.A. Act (sec. 93) respecting "laws passed for the protection of minorities in educational matters are made applicable "to Manitoba, and cannot be changed; for, by the Imperial Act confirming the estab-"lishment of the new provinces, 34 and 35 Vic., ch. 28, sec. 6, it is provided that it "shall not be competent for the Parliament of Canada to alter the provisions of the "Manitoba Act in so far as it relates to the Province of Manitoba. Obviously, there-"fore, the Separate School System in Manitoba is beyond the reach of the Legislature "or of the Dominion Parliament."

In the light of the evidence is it possible to arrive at any other conclusion, than that the intent of the changes in the wording of the clauses referred to was to give an additional guarantee of protection to the minority; to, in fact, make the guarantee so effectual as to preclude the possibility of interference by subsequent legislation. That the guarantee has not, in part at least, proven as effectual as was desired is the misfortune, not the intention of the framers of the Act. And without desiring to be controversial, this question may, perhaps, properly be put here: If the theory of a French preserve had proven correct, if a minority of Protestants had been deprived of separate schools by the preponderating influence of Roman Catholics in the Manitoba Legislature, would that minority, with the consent of Protestant Canada, be prevented from or condemned for appealing under the law to Parliament for redress?

We come now to the effect of the Act of Union upon educational matters. The law incorporating Manitoba went into effect on 15th July, 1870. Elections to the legislature followed, and at the first session an "Act to establish a system of education in this Province" was passed. This is known as the Act of 1871. Amendments were thereafter made, but perhaps the summary compiled by Mr. Justice Dubuc will cover all points:—

"Under the said provisions of our constitution, the Provincial Legislature, at its "first session, in 1871, passed an 'Act to establish a system of Education in this Pro- "vince.'

"By the said Act, the Lieutenant-Governor in Council was empowered to appoint "not less than ten, nor more than fourteen persons, to be a Board of Education for the "province, of whom one-half were to be Protestants, and the other half Catholics; also "one superintendent of Protestant schools and one superintendent of Catholic schools, "who were joint secretaries of the board.

"The duties of the Board were described as follows: '1st. To make from time to "time such regulations as they may think fit for the general organization of the common "schools; 2nd. To select books, maps and globes to be used in the common schools, due "regard being had in such selection to the choice of English books, maps and globes for "the English schools, and French for the French schools, but the authority hereby given "is not to extend to the selection of books having reference to religion or morals, the "selection of such being regulated by a subsequent clause of this Act; 3rd. To alter and "subdivide, with the sanction of the Lieutenant-Governor in Council, any school dis- "trict established by this Act.'

"The general board was divided into two sections, and among the duties of each "section we find the following: 'Each section shall have under its control and manage- "ment the discipline of the schools of the section; it shall make rules and regulations "for the examination, grading and licensing of teachers, and for the withdrawal of "licenses on sufficient cause; it shall prescribe such of the books to be used in the schools "of the section as have reference to religion or morals.'

"By section 13, the moneys appropriated to education by the Legislature were to "be divided equally, one moiety thereof to the support of Protestant schools, the other "moiety to the support of Catholic schools.

"The first board appointed by the Lieutenant-Governor in Council was composed "of the Bishop of St. Boniface, the Bishop of Rupert's Land, several Catholic priests, "several Protestant clergymen of various denominations, and a couple of laymen for each "section.

"The said statute was amended from time to time, as the country was becoming "more settled, and new exigencies arose. But the same system prevailed until the Act "of last session; the only substantial amendments were that, in 1875, the board was "increased to twenty-one, twelve Protestants and nine Roman Catholics, and the moneys "voted by the legislature were to be divided between Protestants and Catholics in pro- "portion to the number of children of school age in the respective Protestant and "Catholic districts.

"The more noticeable change in the system was that the denominational distinction "between the Catholics and Protestants, and the independent working of the two sec- "tions became more and more pronounced, under the different statutes afterwards passed. "Section 27 of the Act of 1875, c. 27, says, that the establishment of a school district "of one denomination shall not prevent the establishment of a school district of the other "denomination in the same place.

"The same principle is carried out and somewhat extended by sections 39, 40, and "41 of the Act of 1876, c. 1.

"In 1877, by c. 12, s. 10, it was enacted that in 'no case a Protestant ratepayer shall "be obliged to pay for a Catholic school, and a Catholic ratepayer for a Protestant "school.'"

It will be seen that separate schools of the most pronounced description were established by the legislature, that Protestants and Roman Catholics were given entire control over their respective sections, and that no Protestant was obliged to pay for a

Roman Catholic school or a Roman Catholic for a Protestant school. This lasted until 1890 when the legislature passed the Acts that have since become so celebrated.

The School Acts of Manitoba, 1890, are two in number. The first abolished the Board of Education and the office of Superintendent of Education, and created a Department of Education, which is to consist of the executive council or a committee thereof, and also an advisory board composed of seven members, four to be appointed by the Department of Education, two by the teachers of the province and one by the university council. The advisory board, among other duties, authorize the text books and books of reference for schools and libraries, and "prescribe the form of religious exercises to be "used in schools."

The second Act is the "Public Schools Act." It repeals all other laws relating to education, and takes over all previously existing Protestant and separate schools, makes all the schools free, giving all the children the right to attend them, provides that religious exercises shall be conducted according to the regulations of the advisory board, but gives parents the permission to absent their children, if they so desire, from such religious exercises; gives the trustees of each district the option of holding religious exercises or not, and provides (sec. 8) "the public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided." No school except as conducted above is to participate in the legislative grant, no municipal tax is to be levied except for public schools, and Catholic school districts cease to exist, assets and liabilities going to the public school district.

It is not contended that this is not a clear and complete wiping out of the Roman Catholic separate schools. The only issue is whether the legislature had power to so dispose of the schools of the minority once they had been established. The Roman Catholics at once took action.

CHAPTER VII.

THE BARRETT AND LOGAN CASES.

THE first appeals by the minority could be disposed of in very few words were it not that certain influential authorities contend that they, in fact, concluded the whole dispute and the only legal or possible ground of appeal. That contention, we are surprised to see, is still submitted, even after the second decision of the Privy Council, in order to attack proceedings held subsequently, and because of this we are compelled to use sufficient space to at least recite the facts.

Proceedings were taken in November, 1890, to test the validity of the Manitoba educational acts of 1890, by means of an application from Dr. Barrett, a Roman Catholic ratepayer, to quash a by-law of the city of Winnipeg fixing a rate of taxation for public school purposes and passed under the authority of the newly created statutes. Action was taken under sub-section I. of section 22 of the Manitoba Act, on the ground

that the Legislative Acts perjudicially affected a right or privilege enjoyed by the plaintiff in respect to denominational schools; it being contended that he formed one of "a class of persons" who had, "by law or practice," such rights at the time of the union. The application was supported by the usual affidavits, among others, one by Archbishop Tache, in which his Grace stated:

"During the period referred to (prior to the Union), Roman Catholics had no in-
"terest in or control over the schools of the Protestant denominations, and the members
"of the Protestant denominations had no interest in or control over the schools of the
"Roman Catholics. There were no public schools in the sense of State schools. The
"members of the Roman Catholic Church supported the schools of their own Church
"for the benefit of Roman Catholic children and were not under obligation to, and did
"not contribute to the support of any other schools

"In the matter of education, therefore, during the period referred to, Roman Cath-
"olics were, as a matter of custom or practice, separate from the rest of the community,
"and their schools were all conducted according to the distinctive views and beliefs of
"Roman Catholics as herein set forth."

The application to quash the by-laws was made before Mr. Justice Killam on November 24th, 1890, who dismissed the summons, holding that the rights and privileges referred to in The Manitoba Act were merely those of maintaining voluntary denominational schools, of having children educated in them, and of having inculcated in them the doctrines peculiar to the respective denominations. He regarded the prejudice affected by the imposition of a tax upon Roman Catholics for schools to which they were conscientiously opposed as something so indirect and remote that it was not within the Act.

An appeal was taken to the Manitoba Court of Queen's Bench and judgment was given on February 2nd, 1891. The full court affirmed the decision of Judge Killam. Chief Justice Taylor and Mr. Justice Bain held that "rights and privileges" included moral rights, and that whatever any class of persons had been doing in reference to denominational schools before the union, should continue and not be prejudicially affected by Provincial legislation, but that none of these rights and privileges had been affected by the Acts of 1890. Mr. Justice Dubuc dissented, holding that the right or privilege existing at the time of the Union was the right of each denomination to have its denominational schools, with such teaching as it might think fit, and the privilege of not being compelled to contribute to other schools of which members of such denomination could not in conscience avail themselves; and that the Acts of 1890 invaded such privilege and were consequently *ultra vires*.

Perhaps these judgments will be the more clearly understood if we say that the Chief Justice, and Justices Killam and Bain held that the words "or practice" in the first sub-section of section 22 of The Manitoba Act did not bring the plaintiffs within the jurisdiction of the Act, because the only practice was, as His Grace of St. Boniface had said, for each denomination to voluntarily support its own schools, and this could be done under the Acts of 1890. Mr. Justice Dubuc held, on the other hand, that the "practice" did apply, and was intended to refer to denominational schools under State aid, and that the abolition of such schools was not within the power of the Legislature.

The case next went to the Supreme Court of Canada, where judgment was delivered on October 28th, 1891. The Supreme Court unanimously reversed the decision of the

Court of Queen's Bench, holding the Acts to be *ultrà vires*. Chief Justice Ritchie held that as Catholics could not conscientiously continue to avail themselves of the Public Schools Act, 1890, the effect of that Act was to deprive them of any further beneficial use of the system of voluntary Catholic schools which had been established before the union, and had thereafter been carried on under the State system introduced in 1871. In other words, that the "practice" prior to the union had given a right or privilege after the union. Mr. Justice Patterson pointed out that the words "injuriously affect" in section 22, sub-section I. of The Manitoba Constitutional Act, would include any degree of interference with the rights or privileges in question, although falling short of the extinction of such rights or privileges. He held that the impediment cast in the way of obtaining contributions to voluntary Roman Catholic denominational schools by reason of the fact that all Roman Catholics would, under the Act, be compulsorily assessed to another system of education, amounted to an injurious affecting of their rights and privileges within the meaning of the sub-section. Mr. Justice Fournier pointed out that the mere right of maintaining voluntary schools, if they chose to pay for them, and of causing their children to attend such schools, could not have been the right which it was intended to reserve to Catholics or other classes of persons, by the use of the word "practice," since such right was undoubtedly enjoyed by every person or class of persons by law. Mr. Justice Taschereau took the same view, holding that the contention of the appellants gave no effect to the word "practice" inserted in the section. The fifth presiding justice concurred, but did not render a separate judgment.

Thus for the Canadian Bench six judges decided the Acts to be *ultra vires* and three that the "practice" before the union did not extend beyond the establishment of denominational schools by voluntary subscription and did not create any greater privilege after the union.

We must here digress for a moment in order to bring the Logan case up to date. In December, 1891 Mr. Alex. Logan instituted proceedings, similar to those in the Barrett case, on behalf of the Episcopalians. His case was supported by affidavits from the Bishop of Rupert's Land and others. Bishop Machray, among other things said in his affidavit :—

"With the great majority of the bishops and clergy of the Church of England, I "believe that the education of the young is incomplete, and may even be hurtful if "religious instruction is excluded from it.

"The religious and moral training given to children in the public schools of this "Province, under sanction of the laws of this Province, is not in accordance with my "views or wishes, and is not in accordance with the views of the Church of England; and "consequently the present law, in taxing all members of the Church of England, and "giving no aid from the State to denominational schools, prejudicially affects the rights "and privileges of the people belonging to the Church of England with respect to the "denominational schools which they had by practice, and were lawfully exercising, be-"fore and at the union of this Province with Canada.

"The re-establishment of our parish schools is merely a question of means and time.

"If Separate Schools are granted to any body of Christians because of rights secured "owing to practice existing prior to the union, then I claim that the Church of England "is peculiarly entitled to such Separate Schools."

On December 19th, 1891, judgment was given in this case by the Court of Queen's Bench of Manitoba. The Supreme Court of Canada had already held the Provincial Statutes to be *ultra vires* and the Manitoba Court felt bound by the decision. They therefore declared that the Episcopalians were a "class of persons" whose rights had been prejudicially affected.

Appeal was taken in the Barrett case from the Supreme Court of Canada to the Judicial Committee of the Privy Council, and the Logan case was sent on direct to the same body. The two cases were heard concurrently and judgment was rendered on July 30th, 1892.

Six judges heard the appeal, Lord Watson, Lord Macnaghten, Lord Morris, Lord Hannen, Lord Shand and Sir Richard Couch.

Counsel for the City of Winnipeg were Sir Horace Davey, Mr. Dalton McCarthy and Hon. Joseph Martin. For Barrett, Attorney-General Sir Richard Webster, Hon. Edward Blake, Mr. J. S. Ewart and Mr. Gore. For Logan, Mr. A. J. Ram.

The argument lasted several days, five of the counsel addressing the Court when judgment was reserved and delivered on the date mentioned. As the Barrett and Logan cases were identical the judgment covered both.

Their lordships, in rendering decision, started out by saying that their duty was simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, having regard to the state of things which existed in Manitoba at the time of the union; the Provincial Legislature had or had not exceeded its powers in passing the Public Schools Acts. They found that the exceptions in The Manitoba Act to the provisions of the British North America Act "were not material to the present question," and that the word "practice" could not be construed as equivalent to "custom having the force of law." It was agreed that there was no law or ordinance with respect to education prior to the union, therefore the only right by practice was that of voluntarily maintaining denominational schools and paying for them. Possibly this right, if it had been defined or recognized by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contributions, under any circumstances, to schools of a different denomination; but, said their lordships, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools, that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purposes of the other. The conscientious objection of the Roman Catholics and Episcopalians to sending their children to other than denominational schools, their lordships could not recognize as a fault of the law. They, therefore, reversed the decision of the Supreme Court of Canada, and declared the Manitoba Public Schools Acts *intra vires*.

One clause in the judgment not pertinent to the present case, but having a bearing on later proceedings, we may quote :—

"At the commencement of the argument a doubt was suggested as to the com-
"petency of the present appeal, in consequence of the so-called appeal to the Governor-
"General-in-Council, provided by the Act. But their lordships are satisfied that the

"provisions of sub-sections 2 and 3 do not operate to withdraw such a question as that "involved in the present case from the jurisdiction of the ordinary tribunals of the "country."

This ended the Manitoba school case, so far as the validity of the law was concerned. We know that the word "practice" was inserted in sub-section I. of section 22 of The Manitoba Act, in the belief that it meant, and the intention that it should be construed as equivalent to a custom having the force of law, but their lordships could not find that the word had such meaning, they had to deal with the word itself and not the intention of the framers of the act, and so deciding, they could come to but one conclusion. There being no law in operation at the time of the union, it was a matter of impossibility that any right or privilege with respect to denominational schools could have been prejudicially affected within the meaning of the first sub-section.

CHAPTER VIII.

Appeal to the Governor-General.

We now come for the first time to the practical working out of sub-sections 2 and 3 of section 22 of The Manitoba Act, and sub-sections 3 and 4 of section 93 of The Confederation Act. It will be remembered that these clauses give an appeal to the Governor-General-in-Council if any right or privilege of a Roman Catholic or Protestant minority in the matter of separate or dissentient schools, established by the legislature after the union, is affected. It was here that the Roman Catholics and the Episcopalians parted company, for while sub-section I. construed each denomination "a class of persons," the following sub-sections deal with but two classes, Protestants and Roman Catholics.

After the decision of the Manitoba Court of Queen's Bench in the Barrett case, the Roman Catholics, fearing, perhaps, as to the final outcome, determined to appeal concurrently to the Governor-General-in-Council under the authority above named, and, consequently, a petition, coupled with an appeal, was forwarded to Ottawa, signed by Archbishop Tache and some 4,300 others. The petition recited the facts from the complainants' point of view, with which we are already familiar, and made the appeal in the following terms:

"1. That Your Excellency the Governor-General-in-Council may entertain the said "appeal, and may consider the same, and may make such provisions and give such "directions for the hearing and consideration of the said appeal as may be thought proper.

"2. That it may be declared that such Provincial law does prejudicially affect the "rights and privileges with regard to denominational schools which Roman Catholics "had by law or practice in the Province at the union.

"3. That such directions may be given and provisions made for the relief of the "Roman Catholics of the Province of Manitoba as to Your Excellency in Council may "seem fit."

It will be noticed that his Grace but imperfectly understood or appreciated the

grounds upon which the appeal would ultimately have to be made. The form was afterwards amended.

On March 21st, 1891, Sir John Thompson, as Minister of Justice, reported on the two bills and the appeal. He found that several questions having arisen as to the validity and effect of the statutes under review, it became apparent at the outset that these questions required the decision of the judicial tribunals. The appeal in the Barrett case was then before the Supreme Court, and said Sir John, "if the appeal should be successful these Acts will be annulled by judicial decision; the Roman Catholic minority of Manitoba will receive protection and redress." If the appeal should be unsuccessful, "the time will come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under sub-sections 2 and 3 of section 22 of the Manitoba Act." These sub-sections, Sir John went on to say, were obviously those under which the constitution intended that the Government of the Dominion should proceed, if it should at any time become necessary that the Federal power should be resorted to for the protection of any right or privilege in regard to education, of any Roman Catholic or Protestant minority in any province.

Under the decision of the Minister of Justice that the time had not yet arrived to entertain an appeal to the Governor-General-in-Council, this matter remained in abeyance until the Privy Council decision in the Barrett and Logan cases had been rendered. Immediately thereafter the appeal was renewed, several petitions being sent to Ottawa; the appeal signed by Archbishop Tache and others praying that:

"1. That Your Excellency the Governor-General-in-Council may entertain the said "appeal and may consider the same, and may make such provisions and give such direc- "tions for the hearing and consideration of the said appeal as may be thought proper.

"2. That it may be declared that the said Acts (53 Vic., chaps. 37 and 38) do pre- "judicially affect the rights and privileges with regard to denominational schools which "Roman Catholics had by law or practice in the province at the union.

"3. That it may be declared that the said last mentioned Acts do affect the rights "and privileges of the Roman Catholic minority of the Queen's subjects in relation to "education.

"4. That it may be declared that to Your Excellency the Governor-General-in- "Council, it seems requisite that the provisions of the statutes in force in the Province "of Manitoba prior to the passage of the said Acts, should be re-enacted in so far at least "as may be necessary to secure to the Roman Catholics in the said province the right to "build, maintain, equip, manage, conduct and support these schools in the manner pro- "vided for by the said statutes, to secure to them their proportionate share of any grant "made out of the public funds for the purposes of education, and to relieve such members "of the Roman Catholic Church as contribute to such Roman Catholic schools from all "payment or contribution to the support of any other schools; or that the said Acts of "1890 should be so modified or amended as to effect such purposes.

"5. And that such further or other declaration or order may be made as to Your "Excellency the Governor-General-in-Council shall, under the circumstances, seem proper, "and that such directions may be given, provisions made and all things done in the "premises for the purpose of affording relief to the said Roman Catholic minority in the "said province as to Your Excellency in Council may seem meet."

The whole matter was referred to a sub-committee of the Cabinet, composed of Sir John Thompson, Sir Mackenzie Bowell, Hon. J. A. Chapleau and Hon. T. Mayne Daly. The committee sat on November 26th, 1892, for the purpose of hearing counsel

in behalf of the petitions, and were addressed by Mr. Ewart. On January 21st, 1893, the committee reported. They were of opinion that the judgment of the Privy Council, already rendered, was conclusive as to the rights with regard to denominational schools which the Roman Catholics had at the time of the union, and that, therefore, His Excellency could not hear an appeal based upon those grounds. It remained to be considered whether an appeal should be heard as to rights acquired after the union. Upon this point the sub-committee gave no opinion, pointing out that questions had arisen as to the construction of The Manitoba Act and that others would arise which should first be settled. They were of opinion that the application was not to be dealt with "at present" as a matter of a political character or involving political action, and they advised that a date be fixed at which these "questions" should be argued by counsel.

The report of the sub-committee was adopted and the hearing took place on January 21st, 1893. Nearly the whole cabinet was present. Manitoba did not deem it necessary to be represented, but Mr. Ewart appeared for the petitioners and argued the case very fully. The Council decided that the questions of law referred to by the sub-committee would have to be authoritatively dealt with before they could proceed further,—as it was once expressed, they had to make sure of their ground—and accordingly, a reference of the case was made to the Supreme Court.

We must now turn from the main question for a moment to ascertain how and why it is that such reference could be made to the Supreme Court.

The Manitoba Education Acts of 1890 were first brought to the attention of the Parliament of Canada by Hon. Edward Blake on the 29th April, 1890, when he moved in the House of Commons:

"That it is expedient to provide means whereby, on solemn occasions, touching the "exercise of the power of disallowance or of the appellate power as to educational legis- "lation, important questions of law or fact may be referred by the Executive to a high "judicial tribunal for hearing and consideration, in such mode that the authorities and "parties interested may be represented and that a reasoned opinion may be obtained "for the information of the Executive."

In the course of the debate on this resolution Mr. Blake stated that he considered it as settled, at all events for the bulk of the Liberal party and for himself, that as a question of policy there should be no disallowance of educational legislation, for the mere reason that in the opinion of the Dominion Parliament some other and different policy than that which the Province has thought fit to adopt would be a better policy, and referred to the action that had been taken in the New Brunswick case, when disallowance of an Educational Act had been refused, and the action of the Government was sustained in the House of Commons by a large majority. Mr. Blake further stated that his resolution was mainly due to the anticipated difficulties in connection with the Manitoba Acts, and that he would recommend a reference to a high judicial tribunal in all cases of educational appeal, as they were cases that necessarily evolved the strongest feelings.

Sir John Macdonald acquiesed in the view taken by Mr. Blake and accepted the amendment, pointing out, however, that appropriate legislation could not be introduced

at the time. He promised a measure for the following session, and, in the meantime, as there was no provision under which a satisfactory reference could be made, the Federal authorities defrayed the expenses of the Barrett case in order that at least the validity of the Acts might be tested. This action has been condemned in certain quarters, very wrongly, we think, as the Government were but following the precedent set in the New Brunswick school case, where a sum of $5,000 was voted to test the constitutionality of an Act respecting education. It is contended that in the New Brunswick case the money was first voted by Parliament, while in the later appeal the Government acted without consulting the House; but this argument will not hold for a moment, because Parliament, by adopting Mr. Blake's resolution, had expressly ordered the Ministry to secure a judicial decision, and this was the only way, at that time, in which it could be secured. It is further charged that the Government were rushing, with unseemly haste, to the aid of the Roman Catholics of Manitoba in a matter in which only Manitobans were concerned; but this can hardly be accepted as the allegation of reasonable men, for on the Government rested the imperative duty of allowance or disallowance of these educational measures, a power of the gravest consequence, to be exercised only with the greatest discretion, after the most thorough investigation, and, on a subject in which men's passions are easily aroused, only after every question of law and of fact has been authoritatively settled.

In accordance with the promise of Sir John Macdonald an amendment to the "Act Regulating Reference to the Supreme Court" was passed in the session of 1891. As the measure is a short, and a most important one, we append it in full:—

"Section 37 of the said Act is hereby repealed and the following substituted therefor:

"37. Important questions of law, or fact, touching provincial legislation, or the "appellate jurisdiction as to Educational matters vested in the Governor-in-Council by "'The British North America Act, 1867,' or by any other Act or law, or touching the "constitutionality of any legislation of the Parliament of Canada, or touching any "other matter with reference to which he sees fit to exercise this power, may be referred "by the Governor-in-Council to the Supreme Court for hearing or consideration; and "the Court shall thereupon hear and consider the same.

"2. The Court shall certify to the Governor-in-Council for his information, its "opinion on questions so referred, with the reasons therefor, which shall be given in like "manner as in the case of a judgment upon an appeal to the said Court, and any judge "who differs from the opinion of the majority shall in like manner certify his opinion "and his reasons.

"3. In case any such question relates to the constitutional validity of any Act "which has heretofore been, or shall hereafter be passed by the legislature of any Pro- "vince, or of any provision in such Act, or in case of any reason the Government of any "Province has any special interest in any such question, the Attorney-General of such "Province, or in the case of the North-West Territories, the Lieutenant-Governor thereof, "shall be notified of the hearing, in order that he may be heard if he thinks fit.

"4. The Court shall have power to direct that any person interested, or where there "is a class of persons interested, any one or more persons as representatives of such class, "shall be notified of the hearing upon any reference under this section, and such persons "shall be entitled to be heard thereon.

"5. The Court may in its discretion request any counsel to argue the case as to any "interest which is affected, and as to which counsel does not appear; and the reasonable "expenses thereby occasioned may be paid by the Minister of Finance and Receiver "General out of the moneys appropriated by Parliament for expenses of litigation.

"6. The opinion of the Court upon any such reference although advisory only, "shall, for all purposes of appeal to Her Majesty in Council, be treated as a final judg- "ment of the said Court between parties.

"7. General rules and orders with respect to matters coming within the jurisdic- "tion of the Court under this section may be made in the same manner, and to the same "extent, as is provided by this Act with respect to other matters within its jurisdiction; "and, in particular, such rules and orders as to the judges making them seem best for "the investigation of questions of fact involved in any reference thereunder.

It was under this Act, devised especially to meet the circumstances that had arisen in connection therewith that the case under discussion went to the Supreme Court.

The questions submitted for hearing and consideration by the Supreme Court of Canada were as follows:—

"(1) Is the appeal referred to in the said memorials and petitions and asserted "thereby, such an appeal as is admissible by sub-section 3 of section 93 of the British "North America Act, 1867, or by sub-section 2 of section 22 of the Manitoba Act, 33 "Victoria (1870), chapter 3, Canada?

"(2) Are the grounds set forth in the petitions and memorials such as may be the "subject of appeal under the authority of the sub-sections above referred to, or either "of them?

"(3) Does the decision of the Judicial Committee of the Privy Council in the cases "of Barrett *v.* the City of Winnipeg, and Logan *v.* the City of Winnipeg, dispose of, or "conclude, the application for redress based on the contention that the rights of the "Roman Catholic minority which accrued to them, after the union, under the statutes "of the province have been interfered with by the two statutes of 1890, complained of "in the said petitions and memorials?

"(4) Does sub-section 3 of section 93 of the British North America Act, 1867, "apply to Manitoba?

"(5) Has His Excellency the Governor-General-in-Council power to make the "declarations or remedial orders which are asked for in the said memorials and petitions, "assuming the material facts to be as stated therein, or has His Excellency the Govern- "or-General-in-Council any other jurisdiction in the premises?

"(6) Did the Acts of Manitoba relating to education, passed prior to the session of "1890, confer on or continue, to the minority, a 'right or privilege in relation to educa- "'tion,' within the meaning of sub-section 2 of section 22 of the Manitoba Act, or "establish a system of separate or dissentient schools within the meaning of sub-sec- "tion 3 of section 93 of the British North America Act, 1867, if said section 93 be "found to be applicable to Manitoba; and, if so, did the two Acts of 1890 complained "of, or either of them, affect any right or privilege of the minority in such a manner "that an appeal will lie thereunder to the Governor-General-in-Council?"

The case came before the Court on October 4th, 1893, Hon. J. J. Curran, Solicitor-General, appearing for the Dominion, but did not argue, Mr. Ewart for the petitioners, and Mr. Wade to watch the proceedings for the Province of Manitoba, but not to argue. The Court consequently appointed Mr. Christopher Robinson to argue on behalf of the province. Judgment was rendered on February 20th, 1894.

In considering the decision of their lordships, one cannot help being somewhat amused at a perfectly evident temper, persumably at their former decision being revoked, exhibited by certain of the occupants of the bench. Especially is this noticeable on the

part of Mr. Justice Taschereau, who commences by questioning his own jurisdiction and thereafter proceeds to condemn pretty much everything in sight. Possibly it is not permissable in theory to admit that our grave and august wearers of the ermine can be subject to human infirmities, but in the layman at least there is aroused a strong suspicion that the dominant idea in the minds of the majority of the Court was "very well, your Imperial Lordships having decided that no minority rights existed under sub-section 1, when we had unanimously held to the contrary, we will take you at your word and go you one better by deciding that the minority never had and never could have any rights, and you can take the consequences." Of course the layman, being unlearned in the law, is quite as liable to err as even a member of the Supreme Court of Canada.

Chief Justice Sir Henry Strong decided that the difference in expression between the British North America Act and The Manitoba Act, could refer to nothing but a deliberate intention to make some change in the operation of the respective clauses, and that every presumption must be made in favor of the constitutional right of a legislative body to repeal the laws which it had itself enacted. He held that the Legislature of Manitoba had absolute power over its own legislation, untrammeled by any appeal to Federal authority and that rights or privileges created after the union only existed until the laws creating them were repealed by the legislature that had passed the laws. The appeal to the Governor-General-in-Council applied in his opinion, only to matters prior to the Union. He did not think however, that the Barrett case concluded the application.

Mr. Justice Fournier took exactly the opposite view, a view in accordance with and following out the judgment he had delivered in the Barrett case. He pointed out that the demand of the Red River delegates had been for separate schools, that what was understood to be a satisfactory guarantee in this respect had been inserted in the Manitoba Constitution, and that until 1890 the people of Manitoba had enjoyed those rights and privileges under the said guarantee. It having been decided that certain rights and privileges, which the Red River delegates and the Parliament of Canada had believed to exist "by law or practice in the Province at the Union," did not in point of fact so exist, sub-section 1 was, so to speak, wiped out of the Manitoba Constitutional Act. "But," said his Lordship, "if the parties agreeing to these terms of union were in error in supposing they had by law or practice, prior to the union, certain rights or privileges, they certainly were not in error in trusting that the Provincial Legislature which was being created would forthwith secure, by law and in accordance with article 5 of the bill of rights, separate schools, and that the moneys would be divided between the Protestant and Roman Catholic denominations *pro rata* to their respective populations, as claimed by Article 5 and 7, and that once established, such rights and privileges so secured by an Act of the Legislature would at least be in the same position as rights secured to minorites in the Provinces of Quebec and Ontario under Section 93 of the British North America Act, and sub-sections 2 and 3 were inserted in the Act, so that they might be protected by the Governor-General against any subsequent legislation by either a Protestant or Roman Catholic majority in after years." His Lordship proceeded to say that the only meaning or effect he could give to the changes from the British North America Act in The Manitoba Act was that they were intended as an additional guarantee or protection to the minority, and to prevent interference later on; that there had been an undoubted interference with the rights and privileges of the minority, and that there was nothing inconsistent in The Manitoba

Act as compared with the British North America Act; the former did not vary but went beyond the latter. He therefore answered in the affirmative to all the questions with the exception of number 3.

Mr. Justice Taschereau, after questioning the jurisdiction of the court to act at all, decided that the British North America Act applied to all the provinces of the Dominion except Manitoba, because the words not quoted in The Manitoba Act were intended not to apply; that, therefore, there could not be any appeal, that legislation could not at the same time affect legal rights and not be *ultra vires*, that the School Acts of 1890 had been declared *intra vires* and that the petitioners were virtually renewing their impeachment of the constitutionality of the legislation of 1890 upon another ground. No rights or privileges had been created since the union, and he would therefore answer all the questions but number 3 in the negative.

Mr. Justice Gwynne decided that the appeal in sub-section 2, and the redress given in sub-section 3 related to rights and privileges created under sub-section 1, and that, therefore, rights and privileges could not be created after the union. An appeal could only lie as to matters as they existed at the time of the union. He answered all the questions except number 3 in the negative.

Mr. Justice King raised the point that sub-section 1 contained an express limitation as to time, while in sub-section 2 nothing was said as to time. The natural conclusion, he said, was that with regard to the rights and privileges referred to in the latter clause, the time of their origin was immaterial. "I can," said his Lordship, "give no other reasonable interpretation to the Act in question than that the exercise by the provincial legislature of its undoubted powers in a way so as to give rights and privileges by law to the minority in respect to education, lets in the Dominion Parliament to concurrent legislative authority, for the purpose of preserving and continuing such rights and privileges, if it sees fit to do so." He decided that a system of separate schools within the rights of the minority had been established, and the Acts of 1890 could not fail to affect the rights and privileges of the minority in respect to education. "The view," he continued, "that the effect of this is to restrain the proper exercise, by the legislature, of its power to alter its own legislation is met by the opposite view, that there is no improper restraint if it is a constitutional provision, and that in establishing a system of separate schools, the legislature may well have borne in mind the possibly irrepealable character of its own legislation in thereby creating rights and privileges in relation to education." He coincided in answering the questions with Mr. Justice Fournier.

Therefore three members of the Supreme Court of Canada decided that an appeal did not lie, while two held that an appeal would lie, because rights and privileges within the meaning of the sub-sections had been prejudicially affected. The reference went to the Privy Council.

CHAPTER IX.

LATEST JUDGMENT OF THE PRIVY COUNCIL.

Argument in the appeal from the Supreme Court's decision was opened before the Judicial Committee of the Privy Council on December 11th, 1894.

There were present the Rt. Hon. the Lord Chancellor (Lord Herschel), the Rt. Hon. Lord Watson, the Rt. Hon. Lord Macnaghten, and the Rt. Hon. Lord Shand.

Counsel for the appellants, Hon. Edward Blake, M.P., and Mr. Ewart; for the respondents, Mr. Cozens-Hardy, M.P., Mr. Haldane, M.P., and Mr. Bray.

The reasons given by the appellants were as follows:

"(1) Because there are several marked distinctions of the same character, between "the language of the first and that of the second sub-section of the clause of the Mani- "toba Act, and between the language of the first and that of the third sub-section of the "clause of the British North America Act, shewing that the first sub-section of each "clause relates to a different class of cases and to a different condition from that dealt "with by the later sub-section.

"For example, sub-section 1 of the Manitoba Act refers to a right or privilege with "respect to denominational schools; sub-section 2, to a right or privilege in relation to "education.

"Sub-section 1 refers to a right or privilege of any class of persons, whether such "class constitutes a majority of the population or not; sub-section 2 to a right or privi- "lege of the Protestant or Roman Catholic minority.

"Sub-section 1 relates to any right or privilege existing by law or practice at the "union; sub-section 2 to any right or privilege existent at the date of the Provincial "Act or decision complained of, although created after the union.

"Sub-section 1 is limited to cases in which the right or privilege is prejudicially "affected; sub-section 2 is not so restricted, and would thus extend to a case in which "the relative status was altered by an improvement in the position, even though that of "the minority was not in itself changed for the worse.

"(2) Because an attempted law in violation of the earlier sub-sections of each clause "would be *ultra vires* and absolutely void, and any attempt to enforce it could be suc- "cessfully resisted in the courts by any person aggrieved. These sub-sections are thus com- "plete in themselves, and no appeal to the Governor-in-Council, nor any decision or "legislation by either Legislature, would be requisite, appropriate or useful. But the "classes of cases dealt with by the later sub-sections are those in which the legislative "action is not *ultra vires* or absolutely void, and in which an appeal and decision or "legislation might be requisite, appropriate and useful.

"(3) Because the Manitoba Education Acts passed prior to 1890 did confirm or "continue to the minority a right or privilege in relation to education within the mean- "ing of sub-section 2 of the Manitoba clause, and establish a system of separate or "dissentient schools within the meaning of sub-section 2 of the British North America "clause; and the Manitoba Acts of 1890 did affect a right and privilege of the minority "in such sort that an appeal lies to the Governor-in-Council.

"(4) Because the appeal is admissible under the law; the grounds set forth in the "petitions and memorials are such as may be the subject of appeal; the decision in "Barrett *v.* Winnipeg does not dispose of or conclude the contention of the minority; "sub-section 3 of the British North America clause does apply to Manitoba, and His

"Excellency the Governor-General-in-Council has power to make the declaration or order "prayed for, or to give other appropriate relief, if it shall seem expedient to him so "to do."

The reasons given by the respondents were :—

"(1) Because the provisions of section 22 of the Manitoba Act were intended to "define completely the power of the Legislature of the province to make laws in relation "to education, and the provisions of section 93 of the British North America Act do not "in any way limit, or extend, or affect the power of the Legislature of the province in "that behalf.

"Because the provisions of sub-section 3 of section 93 of the British North America "Act, 1867, are varied by the provisions of sub-section 2 of section 22 of the Manitoba "Act and are not, therefore, by virtue of section 2 of the Manitoba Act applicable to "Manitoba.

"(3) Because, assuming all the provisions of sub-section 3 of section 93 of the "British North America Act to apply to Manitoba, no appeal lies under that sub-section "from the statutes complained of, the only appeal being from an 'Act or decision of "'any provincial authority,' and a statute passed by the Legislature of the province is "not an Act or decision of any provincial authority within the meaning of that section.

"(4) Because, assuming all the provisions of sub-section 3 of section 93 of the "British North America Act to apply to Manitoba, there is not and never has been a "system of separate or dissentient schools established by law in Manitoba.

"(5) Because, under the provisions of section 22 of the Manitoba Act, an appeal to "the Governor-General-in-Council can lie only when rights or privileges existing by law "or practice at the Union have been affected—and the decision in Barrett's and Logan's "cases precludes the appellants from saying that any such rights or privileges have been "affected by the statutes complained of.

"(6) Because, even if the rights and privileges mentioned in section 22 included "rights and privileges created since the union, the statutes complained of have not "affected any right or privilege of the Roman Catholic minority in relation to educa-"tion established by law or practice since that time.

"(7) Because, if the appeal contended for by the appellants lies, the legislature of "Manitoba would be deprived of the right, inherent in all legislatures, of repealing its "own laws, and the legislature, having once passed a statute giving a right or privilege "to any denomination, could never repeal or alter that statute.

"(8) Because the appellants' contentions ascribes to the Governor-General-in-"Council, and the Parliament of Canada, a peculiar and arbitrary jurisdiction to review "and rescind, according to their discretion, and without any reference to the constitutional "rights of the Province of Manitoba, *intra vires* and constitutional laws passed by the "legislature of Manitoba.

"(9) Because the appellants' contention reduces the exclusive right of the legisla-"ture of Manitoba to make laws in relation to education in and for the Province of "Manitoba, conferred on it by positive enactment, to a nullity"

The importance of the proceedings at the juncture we have now reached is our justification for examining at some length both the argument of counsel and the judgment.

Mr. Blake opened the argument by pointing out that this appeal was pending in a sense, at least had been presented at the time their Lordships had heard the former Manitoba case, but it had been deferred until the decision in the Barrett case had been given, on the express ground that that decision might render any consideration of this appeal unnecessary. If the decision in the Barrett case had been to declare the Mani-

toba School Act *ultra vires*, that would have ended the matter. The judgment being otherwise the time had now arrived for consideration of the appeal to the Governor-General-in-Council. Their Lordships coincided in this view, and we may here indicate it as an answer to those who have contended that the dispute practically ended with the judgment in the Barrett case. Mr. Blake then referred to the memorials, petitions and the final ground of appeal by the Manitoba Roman Catholics: "that it may be declared that the said acts affected the rights and privileges of the Roman Catholics in relation to education."

"The LORD CHANCELLOR—It is not before us what should be declared, is it?

"MR. BLAKE—No; what is before your Lordships is whether there is a case for "appeal.

"The LORD CHANCELLOR—What is before us is the functions of the Governor-"General.

"MR. BLAKE—Yes, and not the method in which he shall exercise them—not the "discretion which he shall use, but whether a case has arisen on these facts on which he "has jurisdiction to intervene. That is all that is before your Lordships.

Mr. Blake went on at some length to compare the powers under the British North America Act, sec. 93, and those contended for under The Manitoba Act, sec. 22.

"The LORD CHANCELLOR—I do not quite follow. Are the Manitoba words nar-"rower than the British North America Act?

"MR. BLAKE—We hold them to be wider. * * *

"The LORD CHANCELLOR—That is why it puzzled me—why they say, in other words, "unless you assume Manitoba legislation gives a more limited protection than the British "North America Act.

"MR. BLAKE—That is really the crucial question in this case. That is the "question for argument, what is the meaning of that particular section of the Manitoba "Act, whether it means more, as we contend, or less, as the other side contends. * * *

"The LORD CHANCELLOR—Is it certain that you would be right under the British "North America Act?

"MR. BLAKE—Oh, yes, absolutely beyond the slightest doubt according to my con-"ception. * * * That construction is manifestly right."

Mr. Blake went on to contend that the point of the question was whether rights or privileges acquired by post-union, legislation *intra vires*, and afterwards affected by later provincial legislation *intra vires* also, was subject to this appeal or no. He did not contend that the legislation was void, that was already settled by the former decision, but that it was subject to this appeal. The validity of the Acts had been tested by the condition of things existing by law or practice at the time of the union. The appeal lay under a condition of things created after the union. The learned counsel then took up the law itself. The clause, section 22, dealing "in relation to education" was the enabling clause, the all embracing phrase, meaning any subject affecting education in any way. This power, nevertheless, was "subject and according to provisions" and one of these provisions was the right of appeal on the part of minorities to the Governor-General-in-Council in regard to rights created by legislation after the union affected by still later legislation. The majority could and would protect itself, the minority needed outside protection which had been provided in this manner. Mr. Blake showed that separate schools, with certain rights, had been created by the

Legislature after the union, and then quoted from their lordships' previous judgment as to the effect of the legislation of 1890. "In 1890 the policy of the past nineteen years was reversed. The denominational system of public education was entirely swept away." Was it possible, he asked, to say that rights or privileges of the Roman Catholic minority had not been interfered with or prejudiced by that change?

"The LORD CHANCELLOR—The question seems to me to be this—if you are right in "saying that the abolition of a system of denominational education which was created "by post-union legislation is within the 2nd section of the Manitoba Act and the 3rd "section of the other, if it applies, then you say there is a case for the jurisdiction of the "Governor-General, and that is all we have to decide.

"MR. BLAKE—That is all your lordships have to decide. What remedy we shall "propose to apply is quite a different thing."

Counsel next dealt with the contention that there could be no appeal against an Act *intra vires* of the Legislature. He took the ground that an appeal could only be against an Act that was *intra vires*. A law that was *ultra vires* needed no appeal, it was bad in itself, so much waste paper, a void attempt to do something beyond the power of the Legislature to do and which the courts would set right. The remedy in this case was an appeal, but you did not appeal against a void. The appeal was given as to Acts which "affect any right or privilege," but a void Act affected nothing. Legislation was required for something that had been done which was wrong, but no legislation was necessary to remedy an abortive attempt to do a wrong. In the latter case no such appeal was necessary because the law had power to deal with the case.

"LORD MACNAGHTEN—No appeal would lie because it says 'from anything affect-"ing any right or privilege.' Sub-section 1 does not affect it.

"MR. BLAKE—That is what I say. I say this appeal is from a transaction which "does something. That would be an appeal from an abortive attempt to do some-"thing."

Mr. Blake enunciated an elaborate argument to show that sub-section 1 was complete in itself and related only to denominational schools that existed by law or practice prior to the union, while sub-section 2 had an entirely separate jurisdiction dealing with rights and privileges created after the union by the Legislature itself, and that sub-section 3 of the British North America Act had the same intention and manifestly applied as did The Manitoba Act. The latter Act might supercede the former but could not blot it out. Just here their lordships had something to say;—

"The LORD CHANCELLOR—It really strikes me that the whole of this case will turn on "two questions depending on this sub-section. First, is sub-section 2 meant to do something "more than afford a remedy in cases within sub-section 1? Secondly, if it is, does it "apply a remedy in the case of rights acquired by post-union legislation?

"LORD WATSON—I think that is the question.

"The LORD CHANCELLOR—I think these will turn out to be the only two questions "in the case.

"LORD WATSON—I should say, these two points being decided in your favor, even "Mr. Haldane would find himself hampered in his argument.

"MR. HALDANE—Subject to the question whether there has been any question of "interfering with the right and privilege of the minority. That will be another ques-"tion.

"LORD WATSON—I do not know how that question is one for us."

Perhaps we may leave Mr. Blake's argument just at this point, the balance being mainly devoted to answering the objections to his views raised in the judgments of the Supreme Court of Canada, objections to which their Lordships in England appeared to attach very little importance.

Mr. Ewart followed in a very able address emphazing some of the points raised by Mr. Blake. Summarized the reasons he gave why sub-section 2 was not intended as a remedy for sub-section 1 were as follows: (1) because the language would have been very different; it would have read "affecting any *such* right;" (2) because if 2 be a remedy it would be given to the same persons mentioned in 1; (3) because if 2 is a remedy it would be given in respect of the same rights as 1; (4) because if 2 is a remedy it would be given under the same circumstances as 1; (5) because no such remedy is necessary in respect of void Acts; (6) because such a remedy is wholly inappropriate—an appeal on a dry legal question of *ultra vires* to a political body without any reason for its withdrawal from the Courts; (7) because no such remedy is given in respect of any other *ultra vires* legislation; (8) because the relief to be given is not that which would follow upon an appeal from an *ultra vires* Act—remedical laws are to be made; if the Governor-General thought an Act *ultra vires* he would not request the Local Legislature to pass an Act, and would not ask the Dominion Parliament to legislate upon default. Mr. Ewart's reasons for the contention that sub-section 2 applies to post-union rights were (1) that there was nothing to limit the generality of the phrase "an appeal shall lie to the Governor-General from any Act;" (2) that the requisite of an Appeal was that some rights should have existed, but it was not material as to the date of their birth as shown by the absence of the words "at the union", (3) that it was intended to protect the rights of minorities and for all time.

Mr. Cozens-Hardy, M.P., for the respondents submitted that the point in the case and the only point before their Lordships could be divided into two, (1) was there any Appeal from a post-union *intra vires* Act of the Legislature, and (2) if that were so, did this post-union legislation, including in that term the Acts of 1890, affect any right or privilege of the minority. He argued that section 22 of the Manitoba Act superceded section 93 of the British North America Act, taking the ground that the words "subject and according to the following provisions," could not apply to section 22 and as well to any provisions of section 93 of the British North America Act. Then taking section 22 as the whole code for Manitoba he argued that its objects were to define and to limit the exclusive powers of legislation granted the Legislature, to preserve the rights and privileges with respect to denominational schools which existed at the union, and these only, and that the only effect of sub-section 2 was to give a special means of testing whether the Legislature had or had not gone beyond the limits imposed upon it by sub-section 1. Their Lordships dissented from this latter view at once, nevertheless Mr. Cozens-Hardy held to his contention supplementing it with the statement that the legislation of the Dominion Parliament would be to annul a void enactment of the Legislature. Why an appeal should be taken to Parliament to do, in the case of a void Act, that which the Courts would and must do, he did not attempt to explain. The learned counsel next raised the point that it was contrary to principle that an admittedly *intra vires* Statute could not be revoked by the legislative body which created it. In doing

this he admitted that the effect would be that practically there was no protection to the Manitoba minority.

Dealing with the second part of the case, as he had divided it, Mr. Cozens-Hardy held that no right or privilege had been interfered with, taking the ground that what was referred to was a right or privilege of a minority, as such, under the law, as against a majority in a particular locality. As both Protestant and Roman Catholic minorities were mentioned, he contended that localities were intended to be dealt with, and not the general community. He submitted that in no locality had either a Protestant or Roman Catholic, under the laws prior to 1890, a right or privilege not accorded to the other and that, therefore, no right or privilege within the meaning of the Act had been created, but their Lordships dissenting somewhat strongly, the learned counsel rather abruptly closed his argument.

Mr. Haldane, M.P., followed, dividing the question at issue into two parts, as had his predecessor. Summed up, his argument on the first part was, that sub-section I exhaustively defined the powers and limitations of the Provincial Legislature; that sub-section 2 is a sub-section in general language which ought to be construed consistently with sub-section I; that the position of the Governor-General is that of a person having a power of determining on appeal questions of law, and not a person vested with an administrative discretion; that he must be put in a position to deliberate and decide upon questions of *ultra vires*, and that being so, he is not a person vested with discretion, but must exercise judicial authority, which is the condition precedent of the Dominion Parliament coming in and giving effect to his decision, whatever it may be.

It may be remarked here that the contention of the respondents in this argument was the very opposite of that they adopted in the subsequent proceedings, but this is a matter that comes up later.

Mr. Haldane then addressed himself to the second part of the question. The pith of his argument was that a system of education had been created for the whole community, and that dependant upon that system there were rights or privileges granted, of exemption, which had meaning, validity and effect so long, and so long only, as the system continued in effect. The system might be taken away, because the system in itself was not an infringement of a right or privilege, though if the system disappeared the ground or right for exemption disappeared, and no question could be raised as to the right or privilege which had only this contingent and conditional existence. The learned counsel supported this ingenious theory very ably indeed, though without much apparent effect upon their lordships.

Hon. Mr. Blake, in reply, occupied his time chiefly in answering questions of their Lordships, who displayed a most commendable anxiety to get at all the facts in relation to what they expressed as a very complicated case. We need not, interesting as they are, take up space with these questions, the judgment speaks for itself.

Decision was given on January 29th, 1895, the Lord Chancellor delivering the judgment. Their lordships favored practically every contention advanced by Mr. Blake. In dealing with this judgment it will be well to read over again the questions referred to the supreme court given in a preceding page, in order to get a more complete understanding of the effect of the decision.

In the first place their Lordships found it impossible to come to any other conclusion than that section 22 of The Manitoba Act was intended to be a substitute for section 93 of the B.N.A. Act. They held, therefore, that it was section 22 of The Manitoba Act that had to be construed; but even here they did not entirely dissent from the views advanced by Mr. Blake, for they pointed out that it was legitimate to consider the terms of the earlier Act and to take advantage of any assistance which it might afford in the construction of the latter enactment, and, in fact, they did this very thing at a later stage of the judgment. Their next step was to give the exact scope of the decision in the Barrett case, which we may deal with later on. In a word, they showed that the Barrett case dealt with a condition of affairs that existed at the union, while they had now before them events that transpired subsequent to the union.

The question then that presented itself was: are sub-sections 2 and 3 designed only to enforce the prohibition contained in sub-section 1. The arguments against this contention appeared to their Lordships conclusive, and they held it hardly necessary to point out the improbability that it was ever intended to give concurrent remedy by appeal to the Governor-General-in-Council. Such legislation, they said, would indeed be futile. In the opinion, therefore, of their Lordships sub-section 2 was a substantive enactment and not designed merely as a means of enforcing the provision which preceded it. "It would do violence," they said, "to sound cannons of construction if the same meaning were to be attributed to the very different language employed in the two sub-sections."

The next question was: did the sub-section extend to rights and privileges acquired by legislation subsequent to the union? It extended, they found, to "any" right or privilege of the minority affected by an Act passed by the Legislature, and therefore embraced all rights and privileges existing at the time when such Act was passed. Their Lordships could see no justification for putting a limitation on language thus unlimited. It was here that their Lordships referred to section 93 of the B.N.A. Act, which, they held, made it manifest that the provision related to post-union legislation.

Taking up the contention that such a construction of the Act was inconsistent with the power of the Legislature to exclusively make laws in relation to education, and the inherent right of a Legislature to repeal its own legislation, their Lordships held the argument to be fallacious. The power conferred is not absolute but limited, the Legislature is not supreme in all respects. It can deal only with matters relegated to it by the B.N.A. Act as varied by The Manitoba Act, and education was a matter to which this limitation expressly extended. "It may be said to be anomalous," reads the judgment, "that such restrictions as that in question should be imposed on the free action of a legislature, but is it more anomalous than to grant to a minority, who are aggrieved by legislation, an appeal from the legislature to the executive authority? And yet this right is expressly, and beyond all controversy, conferred."

Taking it then to be established that sub-section 2 extended to rights and privileges of the Roman Catholic minority acquired by legislation in the Province after the Union, the next question was whether any such right or privilege had been affected by the Acts of 1890. Their Lordships were unable to see how this question could receive any but an affirmative answer. Comparing the position of the minority prior to 1890 with what it would be under the legislation of that year, it was not possible to say that their rights and privileges in relation to education had not been affected. Their Lordships therefore concluded that sub-section 2 of section 22 of The Manitoba Act is the governing enact-

ment, and that the appeal to the Governor-General-in-Council was admissable by virtue of that enactment, on the grounds set forth in the memorials and petitions inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of the sub-section. They further decided that the Governor-General-in-Council had jurisdiction, and that the Appeal was well-founded, but the particular course to be persued was to be determined by the Canadian authorities, whose duties were sufficiently defined in sub-section 3 of section 22 of The Manitoba Act. All legitimate ground of complaint they thought would be removed if the system established in 1890 were supplemented by provisions which would remove the grievance upon which the appeal was founded.

It will be observed that there is nothing of a hesitating character about this judgment. On the contrary, it is as emphatic as language can make it, and reduces the issue to a very narrow compass indeed.

CHAPTER X.

The Remedial Order.

We have now reached this stage; that it is decided by the highest authority in the realm that rights and privileges of the Roman Catholic minority of Manitoba in respect to education have been infringed upon, and that consequently an appeal to the Governor-General-in-Council will lie. The meaning of the decision, in the words "an appeal shall lie," is, in law, that the Appeal must be heard and decided in accordance with the findings of the Judicial Committee. There was in fact very little for His Excellency-in-Council to do except formally start the Remedial Order upon its mission. The Privy Council had decided the law for them, decided the facts for them, decided the mode of procedure for them, and in almost so many words directed the form their order was to take. Our Government were left really no option in the matter, and though something was said about the discretion to be used, it is not easy to conceive where that discretion was to come in.

Nevertheless argument was heard, the Privy Council meeting on February 26th of this year for that purpose. Mr. Dalton McCarthy appeared for the Province of Manitoba, and Mr. Ewart for the Roman Catholic minority. The learned gentlemen delivered quite excellent stump speeches, which, had they been addressed to a Haldimand audience would no doubt have had effect. Mr. Ewart spoke with bowed head, so he expressed it, when he referred to the broken promises of the Liberal party, and his cheeks burned with shame, so he said, when he thought of the Protestants of Manitoba—which was all no doubt very touching, but scarcely essential. Mr. McCarthy had a suspicion of his learned friend's truthfulness; arraigned members of the body before whom he was speaking, had something to say as to the iniquitous use of the French language in Canada, repudiated the P. P. A., and challenged the Premier to an encounter either on the platform or in the back yard—heroic, but hardly pertinent.

It is scarcely worth while wasting time or space on this so-called argument, yet it may be as well to indicate the line taken by the respective champions, if only to show

how little was left to be said on the subject. Mr. Ewart, aside from his bowed head and his blushes, advanced a claim to a Remedial Order on the grounds: First—the compact made by the Dominion of Canada; second—the promises made by the Protestants of Manitoba; third—the promises made by the Liberal party of Manitoba; fourth—the promises made by the Greenway Government. We cannot conceive that any but the first had bearing. Canada did make a compact with the Red River settlers, making certain guarantees, which compact was crystalized into law, and ratified by Imperial enactment, and upon that, and that only, could the minority rest. It is true that certain Protestant members of the Manitoba Legislature, including the Premier, did promise the Roman Catholic minority, that if they would consent to the abolition of the Provincial Senate, which they looked upon in the light of a safeguard, their rights would never be trampled upon. It is equally true that the Liberal party, through Mr. Martin, the father of the bills of 1890, pledged themselves not to interfere with the Roman Catholic Separate Schools. It is said, though this is denied, that Premier Greenway gave a similar pledge to Archbishop Tache. But admitting all this, what possible bearing can it have upon the discussion. The individuals making the promises may have proven themselves unworthy of belief, or they may have been unable to deliver the goods, but either way promises have no binding force, no legal effect. If the Red River were bridged over with promises it would not alter one iota the status of the minority or the majority. Individuals cannot bind a party or a people. When promises are reduced to law, they then cease to be promises, but become facts, and it is with these that rights are defined. Sir George Cartier's promise to the Protestants of Quebec in 1866 would cut a sorry figure in a court of law to-day, if it had not been invested with the authority of a Legislative enactment. We may therefore brush aside the second, third, and fourth contentions of Mr. Ewart as immaterial.

This gentleman's fifth argument, that government could not properly regulate the supply of religion to be taught in the schools, that this must be done by the authorities of the Church; and his sixth, that the schools under the Act of 1890 are Protestant and not non-sectarian, are equally open to objection in that they were not pertinent. The Council were not sitting to hear argument in favor of or against Separate or any other class of schools, but as to how a remedy was to be applied to a right or privilege that had been adversely affected by Provincial legislation. On this point, which Mr. Ewart did at length reach, a proposal was made for a further Act to that of 1890, called a Separate Schools Act on the lines of the Ontario Statute. The powers granted the minority under this law would be those asked for in the Appeal.

Mr. McCarthy's reply was very elaborate and largely not material. One can scarcely resist the conclusion that the counsel for Manitoba was preparing the ground for an attack upon the government in the counties, rather than trying to influence the Privy Council by argument. How else, for instance, can an address of some hours on the question of whether Bill of Rights No. 4 was or was not authentic, be accounted for? That matter had been disposed of by the highest court in the realm, whose decision was irrevocable. Mr. McCarthy might as well, for all purpose it could have before the tribunal he was then addressing, contradicted the moon. How to, account for a long dissertation tending to show that Roman Catholic schools are poor in class, and ineffectual in result, and that Roman Catholic countries are more illiterate than Protestant countries. It was the right to, and not the efficiency of separate schools that was in question; in fact, the right was even then established and it was only the method of enforce-

ment that was up. Mr. McCarthy is altogether too clever a man and too old a politician to stray so far from the subject matter without an object.

The learned gentleman's argument, in so far as it had direct bearing, resolved itself into this: that a grievance had been proven to exist, that the only appeal for redress was to the Council then sitting, that this was a political and not a judicial tribunal, that, therefore, discretion should be exercised, and that it would not be discreet to grant a remedy, having regard to existing circumstances. There is grave objection to be taken to this line of reasoning, as to which we shall make but short reference here. That a grievance did exist, Mr. McCarthy admitted not once, but several times. He could not escape from it after the explicit pronouncement of the Judicial Committees judgement. Can it then be argued that when the Constitution provides a remedy that the application of that remedy is to be left entirely to the discretion of the body in whose hands the remedy lies? We can find nothing to warrant such a belief in either the spirit or the letter of the Constitution, nor do we conceive it to be in consonance with the theory of free institutions. No institution can be called free, if at any time, and contrary to law, it may be wiped out of existence by a majority, merely because a majority is a majority. This subject will, however, demand further attention later on; meanwhile we wish to give qualified assent to Mr. McCarthy's contention that the Council sat as a political body, but unqualified dissent to the proposition that it could use discretion, in other words, that after the last Privy Council decision it could refuse a Remedial Order. The Manitoba Act says "an appeal shall lie * * * from any Act * * * affecting any right, etc." The Privy Council had decided that a right of the minority had been affected by the legislation of 1890, and that, therefore, the appeal did lie. There was no escape then from hearing the appeal. But the judgment went further. It declared that the Governor-General-in-Council had power to pass a Remedial Order, and in general terms, directed that that power should be exercised as defined in sub-section 3 of section 22 of The Manitoba Act. And, Her Majesty, at the Court of Osborne house, in the Isle of Wight, on the 22nd day of February, 1895, after taking the said report into consideration, was pleased by and with the advice of Her Majesty's Privy Council to approve of the said report of the Lords of the Council, and to order that "the recommendations and directions therein contained be punctually observed, obeyed and carried into effect in each and every particular, whereof the Governor-General of the Dominion of Canada for the time being, and all other persons whom it may concern, were required to take notice and govern themselves accordingly."

It would, we submit, strain the ingenuity of even the learned counsel for Manitoba as it would strain every canon of sound construction of the wording of a judgment to discover wherein the "discretion" of the Privy Council of Canada had existence.

One word more as to Mr. McCarthy's argument. He took the definite ground that the consideration should be not the actual rights and merits of the action to be taken, but the political effect of it; that the action taken by the executive, and presumably by Parliament if necessary, should be guided solely by political expedency and not by any rights that the minority might have under the law. This, he said, was undoubtedly his position. We incline to the belief that the public dissent from this will be practically unanimous. If not, then our boasted system of education has failed to teach us the first principles of morality, and we cannot too quickly establish the system of *teaching* the Bible in the Public Schools. If it is not a deliberate return to the barbaric principle that might makes right we do not understand the English language. A British states-

man would stigmatize as atrocious the proposition that, because a minority was feeble in numbers and influence, rights guaranteed to it under the constitution and proven in the courts to have been invaded, should not be restored because it would be more popular not to do so. We cannot think that in his proposition Mr. McCarthy intends to take higher ground than that of the practical politician, prepared to do to-day what expediency suggests as likely to have the most beneficial influence on the vote market, and let to-morrow take care of itself. Another might have had the faith in him that Manitoba would be better without separate schools, and that if this appeal were refused the injustice would not be long felt, the right would soon be forgotten and a better state of things for all concerned would ensue; but surely it is not for Mr. McCarthy, the champion, if self constituted, of Protestantism and defender extraordinary of the English language, to assert the Jesuitical and essentially un-British principle of doing wrong that good may come of it, on the theory that the end justifies the means. The very thought would call up one of Mr. Ewart's most poignant blushes.

Let us turn from this sad contemplation to what the Council actually did. Mr. Ewart having replied in kind, the matter was taken in deliberation by the Council as a committee of the whole. The report of this committee, drawn up, we understand by the Minister of Justice, Sir Charles Hibbert Tupper, after reciting the various steps that had been taken in this Appeal, and which, having been fully dealt with we need not repeat, decided in favor of the Appeal. The committee's report, subsequent to the recital above mentioned, is as follows:

"That, after the determination of the said questions by Her Majesty-in-Council as "aforesaid, the said appeal of the Roman Catholic minority of Her Majesty's subjects "in Manitoba from the two statutes of the Legislature of the Province of Manitoba "hereinbefore mentioned came on for further hearing before Your Excellency-in-Council "on the 26th day of February and the 5th and 6th and 7th days of March, 1895, in the "presence of counsel both for the Roman Catholic minority of Her Majesty's subjects "in the Province of Manitoba and for the said province, and the committee having "heard and considered what was alleged by counsel on both sides, as well as the judg- "ment of their Lordships of the Judicial Committee of the Privy Council, is of opinion "that effect should be given to the said appeal, and that the said appeal should be "allowed in so far as it relates to rights acquired by the said Roman Catholic minority "under legislation of the Province of Manitoba passed subsequent to the union of that "province with the Dominion of Canada. The committee, therefore recommend that "the said appeal be allowed, and that Your Excellency-in-Council do adjudge and decide "that by the two Acts passed by the Legislature of the Province of Manitoba on the 1st "day of May, 1890, intituled respectively 'An Act respecting the Department of Edu- "cation,' and 'An Act respecting the Public Schools,' the rights and privileges of the "Roman Catholic minority of the said province in relation to education prior to the 1st "day of May, 1890, have been affected by depriving the Roman Catholic minority of the "following rights and privileges which, prievious to and until the 1st day of May, 1890. "such minority had, viz.:—

"(*a*) The right to build, maintain, equip, manage, conduct and support Roman Cath- "olic schools in the manner provided for by the said statutes which were repealed by the "two Acts of 1890 aforesaid.

"(*b*) The right to share proportionately in any grant made out of the public funds "for the purposes of education.

"(*c*) The right of exemption of such Roman Catholics as contribute to Roman "Catholic schools from all payment or contribution to the support of any other schools.

"And the committee also recommend that Your Excellency-in-Council do further

"declare and decide that for the due execution of the provisions of section 22 of 'The "Manitoba Act' it seems requisite that the system of education embodied in the two "Acts of 1890 aforesaid should be supplemented by a Provincial Act or Acts which would "restore to the Roman Catholic minority the said rights and privileges of which such "minority has been so deprived as aforesaid, and which would modify the said Acts of "1890 so far, and so far only, as may be necessary to give effect to the provisions restor- "ing the rights and privileges in paragraphs (*a*), (*b*), and (*c*), hereinbefore mentioned. "The committee desire to add that: Their Lordships of the Judicial Committee state in "their judgment, 'Bearing in mind the circumstances which existed in 1870, it does not "appear to Their Lordships an extravagant notion that in creating a Legislature for the "province with limited powers it should have been thought expedient, in case either "Catholics or Protestants became preponderant, and rights which had come into exis- "tence under different circumstances were interfered with, to give the Dominion Par- "liament power to legislate upon matters of education, so far as was necessary to pro- "tect the Protestant or Catholic minority, as the case might be.''

"In the opinion of the committee 'The Manitoba Act,' as construed with regard "to the present case by the Judicial Committee of Her Majesty's Privy Council, so clearly "points to a duty devolving upon Your Excellency-in-Council that no course is open "consistent with both the letter and the spirit of the constitution other than that recom- "mended. To dismiss this appeal would be not only to deny to the Roman Catholic "minority rights substantially guaranteed to them under the Constitution of Canada, "but in truth such a course might involve the declaration on the part of your Excel- "lency-in-Council that this provision of the constitution for the protection of the rights "of certain of Her Majesty's subjects in Manitoba should not in any case be acted upon, "and further, the committee do not perceive upon what principle, consistently with a "declaration that effect is not to be given to this appeal, the Protestant or Roman Catho- "lic minority in Quebec or Ontario could invoke the corresponding provision of section 93 "of The British North America Act" in case of any Provincial Act or decision affecting "their rights or privileges.

"If Your Excellency should see fit to approve of the foregoing recommendation, the "committee desires to state that it follows that refusal or neglect on the part of the "Legislature of Manitoba to enact remedial legislation which to Your Excellency-in- "Council seems requisite will confer upon Parliament authority to pass such a law. In "this connection it was urged by counsel on behalf of the province that should Parlia- "ment legislate under these circumstances, its enactment would be absolute and irrevo- "cable, so far as both Parliament and Provincial Legislature are concerned. The com- "mittee, without necessarily adopting this view, observe that section 22 of 'The Mani- "toba Act' may admit of that construction. The committee therefore recommend that "the Provincial Legislature be requested to consider whether its action upon the decision "of Your Excellency-in-Council should be permitted to be such as, while refusing to "redress a grievance which the highest court in the Empire has declared to exist, may "compel Parliament to give the relief of which under the constitution the Provincial "Legislature is the proper and primary source, thereby according to this view perman- "ently divesting itself in a very large measure of its authority, and so establishing in "the province an educational system which, no matter what changes may take place in "the circumstances of the country or the views of the people, cannot be altered or re- "pealed by any legislative body in Canada.

"The committee further, and for the reasons hereinbefore stated, recommended "that if Your Excellency-in-Council should be pleased to approve of this report Your "Excellency-in-Council do make an order in the premises in the form and to the effect "as set forth hereunto submitted, and that a certified copy of this minute and of the "said order be transmitted to His Honour the Lieutenant-Governor of Manitoba, for his "information, and that of his Government and the Provincial Legislature, also that a "certified copy of this minute and of the said order be transmitted to Mr. Ewart, Q.C., "of Winnipeg, as representing the Roman Catholic minority of Her Majesty's subjects in "Manitoba."

This deliverance was made to His Excellency-in-Council on March 21st last and was approved. His Excellency did declare and decide, and it was thereby declared, on that date, that it seemed requisite to do as the report of the committee had suggested, and a despatch was forthwith sent to the Manitoba Government requesting the Legislature of that province to supplement the Acts of 1890 by such Legislation as would give to the Roman Catholic minority of that province the right to Separate Schools as they existed prior to 1890, the right to share proportionately in any grant from the public funds for educational purposes, and the right of exemption from payment for the support of other schools.

It will be noticed that the Remedial Order follows with exactitude the lines and where possible the words of the finding of their Lordships of the Imperial Privy Council.

CHAPTER XI.

EXPLANATORY AND CONTROVERSIAL.

THE Remedial Order was transmitted to the Manitoba Government on March 22nd, reached Winnipeg a couple of days later, was at once laid before the Provincial Legislature, and that body adjourned to meet again on May 8th to consider what steps should be taken. The Legislature is not bound to act upon the Order, and it probably will not do so. The Speech from the Throne at the opening of the session declared their intention not to "in any way recede from the determination to uphold the present Public School system." This determination has since been reiterated by Premier Greenway and Attorney-General Sifton. It will no doubt be adhered to, as the local body is not compelled under the law to act. In that event the case comes to the Parliament of Canada and that contingency brings us face to face with a very grave issue indeed.

Is Parliament bound to act at all?

Does it act as a judicial or a political body?

In acting is the expediency of the situation or the created rights of the minority to be taken as the guide?

At the present time, and so far as the matter has yet advanced, there is left no debatable ground whatever in the Manitoba School case. Every step taken has been fully within the law and in accordance with the instructions of the courts. The rights of both parties, as they exist, have been authoritatively defined and the further steps yet to be taken clearly indicated. It is only when the Remedial Order reaches the Parliament of Canada that the possibility for argument will once more arise. And the very first question that will obtrude itself will be that propounded above; need Parliament act at all, cannot the Federal Chamber simply go on about its business and leave this vexed question alone? We apprehend that very little discussion will be needed to show that it will be impossible for Parliament to avoid the issue. The Government are bound under sub-section 3, if the Provincial authority fails to enact the Remedial Order of the Governor-General-in-Council, to bring that Order in the shape of an enactment before

Parliament. And under these circumstances Parliament cannot help but receive it. The Government cannot stop short. They have been directed by the highest court in the Empire to do a certain thing, and their duty only ends when that of Parliament begins. So far the road is then clear.

To the second question we can also find an authoritative and satisfactory answer. We think it clear that Mr. McCarthy's view is correct, that Parliament will sit as a political and not as a judicial body, though we cannot by any means subscribe to the conclusions Mr. McCarthy draws therefrom. In the creation of the Governor-General-in-Council and Parliament as a Court of Appeal under certain circumstances, it is obvious that the intention was that functions other than judicial were to be exercised, because the object, and the sole cause of the creation of the said court, was to see that rights that were to be created for the benefit of the Protestant minority of Quebec, but could not be created until after the Union, would thereafter be fully protected. It is equally obvious that in matters dealing with minority rights a broader discretion than the strict letter of the law is necessary, otherwise protection of minority rights might easily lead to gross wrongs to the majority. Again, it would not be conceivable that concurrent jurisdiction would or could be given to the courts and to Parliament. Nor are we without judicial opinion on this question, which, while not possessing the authority of a decision, is still very valuable. In the last argument before the Judicial Committee the subject was referred to in the following terms :

"MR. BLAKE—Your Lordships will observe the phrase 'at present.' On the pre-"liminary question, which is a question whether there are grounds to entertain an "Appeal, the committee thought they were going to act judicially, but, very properly, "they added the words 'at present' because it is quite obvious that when they enter "upon the sphere of action of entertaining an Appeal their functions must be political, "of expediency and of discretion, just as much as the functions which, in the last resort, "upon their recommendation are assigned to the Parliament of Canada itself; of course "a political body. If the recommendation of His Excellency-in-Council is not obeyed "by the local authorities there devolves upon the Parliament of Canada the right to "legislate to the extent that is necessary to achieve redress warranted by the recom-"mendations of His Excellency-in-Council. Both these transactions, the prior substan-"tive transaction of deciding on the action of the Government-in-Council, and the action "of the Parliament of Canada, are, of course, not judicial but political.

"LORD WATSON—The only effective authority is the Canadian Parliament.

"MR. BLAKE—Yes, the only authority that can do anything; the Governor-in-"Council can recommend only."

And again :—

"LORD SHAND—If the Appeal is before the Governor he would be entitled to take "political consideration into view.

"MR. BLAKE—Doubtless.

"LORD SHAND—That is what you get into if your appeal is a successful appeal.

"MR. BLAKE—I should say so.

"LORD SHAND—It is not a mere construction. That is out of it. It would be purely "political, I suppose.

"MR. BLAKE—It is not out of it. That is one of the reasons why we are here. "Suppose the case of post-union privileges granted and retracted more or less, then the "Governor-General-in-Council has to decide; first of all, whether the case comes within

"the law at all; secondly, whether there had been such a retraction, and then they pro-
"ceed to decide what they think ought to be done in order to give to the minority sub-
"stantially the position which has been withdrawn from them. * * *

"LORD WATSON—I suppose we are not asked to give any such finding or opinion as
"would tie the Governor-General to follow any recommendation of the Canadian Par-
"liament.

"MR. BLAKE—I do not think Your Lordships are. I do not like to make an abso-
"lute concession at this time.

"LORD WATSON—I suppose we are bound to give him advice on this appeal. He
"has asked nothing else but advice throughout. He has not asked for a political deci-
"sion which shall fetter him in any way."

And again :—

"LORD SHAND—Your object is to get the Governor-General by some subsequent
"legislation to remedy it.

"MR. BLAKE—By a suggestion of subsequent legislation, for he is not a legislative
"body, subsequent legislation which may or may not be acquiesced in by a legislative
"body."

Still later, counsel for Manitoba having taken the ground that the action of the Governor-General-in-Council and of Parliament would be judicial, Lord Watson stated emphatically, "I apprehend that the appeal to the Governor is an appeal to the Governor's discretion. It is a political administrative appeal and not a judicial appeal in any proper sense of the term, and in the same way after he has decided the same latitude of discretion is given to the Dominion Parliament. They may legislate or not, as they see fit."

It will be noted here that in the judgment subsequently delivered, Lord Watson went so far as to fully take away the Governor's "latitude of discretion," but it may be accepted that in their Lordship's opinion, the discretion of Parliament does exist, and that Parliament must act as a political and not as a judicial body, and we, therefore, need not again argue that point further. But what then is the difference? Mr. McCarthy says, if you sit as a judicial body you are bound by the strict letter of the law and are not responsible for your acts, but if you sit as a political body you have not to consider the rights but the exigencies of the case and you are responsible to the people, who will reward you not for doing right, but for doing that which for the time being is popular.

We conceive such a position to be utterly untenable. The right of appeal is granted only to a minority as against the acts of the majority, and the Appeal only reaches Parliament after the majority have positively refused to do justice. The minority side is always the unpopular side, therefore under the McCarthy rule of conduct, the minority would always be ruled against and the law of appeal would be a ludricious farce. We rather fear the leader of the Third Party is more concerned about fastening the responsibility for what may be an unpopular recommendation upon the Government of the day, than he is with regard to the rights of citizens. True, the Government is responsible for what it has done and for what it may do, and under our institutions it is impossible that it could be otherwise, but we submit that the rights of citizens are of greater moment than the degree of responsibility of any particular set of politicians.

Rather is not this the case, that Parliament is given jurisdiction by reason of the fact that not being a judicial body it can exercise a discretion that will enable protection being given the minority while interfering as little as possible with the majority. In this very case is it not possible for Parliament to supplement the Manitoba legislation of 1890 in such a manner as will, while giving reasonable redress to the minority, leave totally untouched nine-tenths of the public schools of the Province. Is it not the plain intent of the law that Parliament shall proceed as far only as shall protect absolute rights, and no farther, and that the discretionary power is to be used not in dealing with the popular will, but in getting as nearly as may be to the line of even-handed justice to all concerned. For while Parliament undoubtedly sits as a political body, its action, if it takes action, will be of judicial effect, and is subject to revision by the courts of law.

Parliament then, sitting as a political body, responsible to the people, and disposed to take action, shall it be guided in so doing by political expediency or seek to do justice regardless of the results. Right here is now the meat of the whole question. Far be it from an ordinary layman to question the virtue and value of political expediency, but wherein lies true expediency? Is it better to cram separate schools down the throats of a people who do not want them, or to jam into the gullets of a minority the will of a majority illegally exercised? At the first glance one would be apt to say: if a section of people have rights under the law they should be secured in those rights. Perhaps if we examine into the objections against this view we may be able to judge whether or not it should be adopted.

The first adverse contention is that any action on the part af Parliament will be an interference with Provincial rights. It is said: I swallowed the Jesuits' Estates bill because it was a matter wholly Provincial, and I now object to any interference with Manitoba on the same ground. This argument would be unanswerable if it were not based upon false premises. The Jesuits' Estates Act dealt with the disposal of certain sums of money which had always been in the custody of the province and the jurisdiction as to which had never been questioned and could not be questioned. It was a settlement so to speak between the province and a private claimant in which the Dominion had no interest until a certain point was reached. That point was the very point at issue in the present case. When the Jesuits' Estates moneys were appropriated for purposes of education that moment the Protestant minority in Quebec acquired rights, and that moment the Dominion acquired jurisdiction to protect those rights under the very clauses of the Act and by the very same procedure that the Manitoba minority have taken. The Jesuits' Estate moneys were at first appropriated entirely to Roman Catholic institutions. The Protestants demanded their pro rata share, with alternative of an Appeal to the Governor-General-in-Council. The Mercier Government recognized the justice of the claim and granted it. Therefore there was no ground for interference by the Dominion.

In Manitoba on the contrary, the dispute arises over a matter in which the Dominion is expressly given jurisdiction and for a particular purpose. The power to legislate upon education is granted the province with the distinct reservation that the Federal body shall have right of interference under certain specified circumstances. The Dominion Parliament therefore having concurrent jurisdiction under the Constitution, how can there be an invasion of provincial rights if that jurisdiction is exercised? Such a claim cannot stand a moment's investigation.

The second contention is, and it is one we formerly held, that the power that created legislation has surely the right to amend or annul it. Here again error arises through imperfect knowledge of the powers of the Provincial Legislatures in matters relating to education. The legislatures have exclusive powers to make laws relating to education, "subject and according to the following provisions" the limitations being as to denominational schools in existence before the union, and separate schools created subsequent to the union. When they legislate they must do so with a full knowledge of the limitations to their powers in these respects. Nor is this limitation peculiar. In the United States for instance, the Constitution prohibits the State Legislatures, but not Congress from passing any law imparing the obligation of contract, and this has been held to prevent State Legislatures from repealing or materially altering their own acts conferring private rights when such rights have been accepted.

The third contention is, admitting the power of the Dominion Parliament to interfere, that power should not be exercised (*a*) because separate schools are an injury in that they teach the Roman Catholic faith, and (*b*) that they are inefficient and therefore an injury to the State. This brings up the whole question of the place religion should have in the educational system of a country, a most serious matter to deal with. We have to choose between no religion, some religion and a complete system of religious teaching. It is not disputed that upon the State devolves the responsibility of educating the children of the community. But what is education? The three R's and a county atlas? That definition of education will not be accepted to-day. For instance a knowledge of the human body and the laws relating to the health are now considered essential. Is not a knowledge of God and the laws relating to the salvation of the soul equally important? The Roman Catholics say that education is not worthy of the name unless it includes instruction in the verities of their faith. The Anglican Church believes in teaching religion in the schools, not in mere religious exercises. One Baptist body has declared in favor of purely secular schools. The Presbyterians apparently stand about midway between the two last mentioned. How are we to decide between these conflicting views and still adhere to an undoubtedly just principle that no man should be compelled to pay one cent of taxes to a system of education to which he is conscientiously opposed. We cannot have a school for every denomination and we cannot have a system of religious teaching that will be suitable to all. The verities of the Christian faith as understood, believed and accepted by a Roman Catholic are obnoxious to an Anglican, abhorrent to a Presbyterian, and rank poison to a Methodist, while the precepts of Wesley and the dogmas of Knox and Calvin are viewed by the followers of His Holiness as heretical in their conception and satanic in their influence. The enormous difficulties in the way of any satisfactory solution are apparent.

Usually a compromise is effected, and that the worst possible. Portions of the scriptures are to be read without note or comment. We cannot conceive of a more unwise, a more pernicious practice. No child of school age should have the Bible placed in its hands without competent instruction and explanation. This applies whether it be in school or out of it. A child might stumble through the first book of Euclid without instruction and be none the worse for it, but in a study that is to affect his whole moral nature, surely, if he needs instruction in anything, he needs it there. The proposition to simply repeat the Lord's Prayer and the Ten Commandments seems equally unwise. Would not the daily repetition under such circumstances lose all essence of religion and leave nothing to the child but a tiresome form? Most certainly, we should say; if we are to have religion in the schools at all, it should be taught, and carefully taught.

And here we come to the line of separation. To teach religion we must have separate schools. The Protestant bodies could unite upon a basis that would be acceptable to the different denominations, but the cleavage between the Protestant and Roman Catholic beliefs is too wide to ever hope for an agreement. The "verities" are inconsistent, antagonistic, and cannot be reconciled. There may be mutual respect and toleration, there cannot be more. It comes to this: we must have secular schools or we must have separate schools, or the majority must refuse to the minority the inalienable right of liberty of conscience.

The people of Manitoba have refused, point blank, to make their schools secular, The intention originally was, when the changes were made in 1890, to do away with all scriptural instruction or reading, to have the schools absolutely secular. and had this been done, much of the force of the minorty's protest would have been lost. But the Presbyterians led the dissent, followed promptly by the other Protestant bodies, and the Roman Catholics and Mr. Greenway and Mr. Martin had to alter their law if not their views. A salve to the nonconformists' conscience was concocted by first declaring the schools non-sectarian and then arranging for certain portions of the Protestant Bible to be read therein.

It being then settled that there is to be religious instruction or exercises in the Manitoba schools, we come back to proposition (*a*) that the teaching in schools of the Roman Catholic religion is an injury to the State, and an injury sufficient to warrant the Federal Parliament refusing to restore to the minority certain rights guaranteed them under the constitution. There is no argument to be offered here. Those who hold this belief, and they number not a few, do so from conviction and not from reason. They look upon the Papacy as the arch-enemy of Truth and they will neither offer nor accept compromise. They will vote against anything favoring Roman Catholicism regardless of worldly right or justice. We must even leave them as they are.

Proposition (*b*) that the Manitoba separate schools were inefficient does, however, admit of discussion. We have no doubt that the charge is, to a certain extent, perhaps to a great extent, true. Attorney-General Sifton says they were grossly inefficient, but on the other side this gentleman is suffering from a severe attack of reportorial inaccuracy and newspaper misrepresentation, and when once a man contracts this fatal habit his usefulness as a reliable recorder is greatly impared. However, taking the worst that can be, or has been said, wherein is the application to the present dispute? Proving inefficiency is a condemnation of the Government under which it is allowed to exist, not the class of schools in which it is found. It has never been contended that the Manitoba Government had not the right of inspection and supervision and regulation of all schools. In fact it is the bounden duty of the Government to see that education is efficiently imparted, and if one-half of what Attorney-General Sifton says is true, the administration of his Government, and the previous Government, is indelibly disgraced.

Again, it is contended that the Bible lessons adopted under the law of 1890 are not objectionable and should be satisfactory to all classes. We have read the selections of the Advisory Board and can well conceive that they should prove entirely satisfactory to all Protestants and the reverse to all Roman Catholics.

It is further urged that the Manitoba Government were not fairly dealt with in being allowed only seven days to prepare for the argument before the Governor-General-in-Council. This is one of the Attorney-General's complaints, providing always, of course,

that the gentleman was not at the time suffering from an attack of misreporting. The Manitoba Government had nearly five years instead of seven days to prepare for this argument, and would have been in no better state of preparation if they had been given five years longer.

Lastly, it is claimed that the Dominion, a large body, is imposing something distasteful upon Manitoba, a small body, by mere force of numbers. To most people the basis of the dispute would appear to be the attempt of a very large majority in Manitoba to impose something very distasteful and absolutely illegal upon a very small minority in the same province.

These we take to be the chief reasons advanced why Parliament should, in exercising its functions in the matter, come to the conclusion that it would be better for all concerned to waive the rights of the minority and refuse the redress provided for in the Constitution. We hold them, on the grounds given, to be entirely insufficient. On the other hand what is to be said?

Separate schools were devised for the benefit, not of Roman Catholics, but of Protestants. The Constitution of Canada, so far as it deals with separate schools, was framed in the interest, not of Roman Catholics, but of Protestants. The regulations establishing the right of appeal in favor of separate schools engrafted into the Manitoba Constitution were made specially explicit and binding for the future use, not of a Roman Catholic, but of a Protestant minority, though as events turned out the minority is the other way. The rights of the minority in this instance arise from a compact entered into between the people of Canada and those of the Red River, a compact ratified and made binding by the Parliament of both peoples and the Imperial Parliament as well. This compact defines the rights and prescribes the mode of redress. The minority in defence of their rights have complied with every form of the law, have carried their case through every court of jurisdiction in the land to the foot of the Throne itself, have had their claims favorably decided upon by the highest court in the realm and now come for redress to the power directed by the Constitution to grant it. Can any claim of expediency without the exercise of downright tyranny override the justice of the minority's demand?

It may be well here to draw particular attention to the fact that while the Governor-General-in-Council must decide what changes it is right to ask the Province of Manitoba to make in their educational laws, yet if the provincial authorities fail to perform their duty and Dominion legislation is made requisite, the Dominion Parliament can (as the Manitoba Act expressly enacts), change the provincial law, but *as far only as the circumstances of the case may require.* If the change exceeds what the circumstances of the case *do* require, the Dominion legislation will be *ultra vires* and the Province of Manitoba can at once have the Dominion Statutes declared null and void by the courts. It will be seen, therefore, that every care was taken when the Manitoba Act was framed to prevent the Governor-General-in-Council and the Dominion Parliament from interfering with the powers of the Provincial Legislature with respect to education beyond what was absolutely necessary to protect what may properly be termed the legal rights and privileges of the minority. At the present time the supremacy of the Province of Manitoba in educational matters is absolute, subject only to the exceedingly limited exception that if it injures the rights and privileges that have been acquired since the union by the minority, and refuses to obey the request of the Dominion Executive that right should be done, the Parliament of Canada may then pass such remedial laws as the circumstances of the case require.

It may be as well too, before closing to point out the position of the Dominion Government. That body has so far carefully and properly complied with every provision of the law. Its next duty will arise if Manitoba rejects the Remedial Order, and that duty will be to transmit the same in the form of a bill to Parliament. There the duty of the Government ends. It may make the bill its own and stand or fall by it, but it need not do so. The measure is not a Government one in the sense of being initiated by the Government, and its rejection by Parliament need not be followed by the resignation of the Ministry, as would be the case if a measure initiated by the Government were defeated.

Parliament may reject the Remedial Order, but if it does so, it will be at the expense of honor and by the violation of treaties; it will be a triumph of expediency over right, and of votes over justice; it will be by sacrificing the sacred compacts of the people to the clamor of prejudice; it will be a despicable yielding up of the weak to the strong, and that in defiance of the law and contrary to the decisions of the courts; and it will be in opposition to every rule of British fair play and every canon of British statesmanship, the first principle of which is the invoilable sacredness of treaty rights.

APPENDIX.

THE LATEST JUDGMENT OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 2nd section of the Manitoba Act enacts that after the prescribed day the British North America Act shall "except those parts thereof "which are in terms made or by reasonable in- "tendment may be held to be specially applic- "able to or only to affect one or more but not "the whole of the provinces now composing the "Dominion, and except so far as the same may "be varied by this Act, be applicable to the "Province of Manitoba in the same way and to "the like extent as they apply to the several "provinces of Canada, and as if the Province "of Manitoba had been one of the provinces "originally united by the said Act." It cannot be questioned therefore that section 93 of the British North America Act (save such parts of it as are specially applicable to some only of the provinces of which the Dominion was in 1870 composed) is made applicable to the Province of Manitoba except in so far as it is varied by the Manitoba Act. The 22nd section of that statute deals with the same subject-matter as section 93 of the British North America Act. The 2nd sub-section of this latter section may be discarded from consideration, as it is manifestly applicable only to the Provinces of Ontario and Quebec. The remaining provisions closely correspond with those of section 22 of the Manitoba Act. The only difference between the introductory part and the 1st sub-section of the two sections, is that the Manitoba Act in the words "or practice" are added after the word "law" in the 1st sub-section. The 3rd sub-section of section 22 of the Manitoba Act is identical with the 4th sub-section of section 93 of the British North America Act. The 2nd and 3rd sub-sections respectively are the same, except that in the 2nd sub-section of the Manitoba Act the words "of the Legislature of the Province or" are inserted before the words "any Provincial authority," and that the 3rd sub-section of the British North America Act commences with the words: "Where in any "Province a system of separate or dissentient "schools exists by law at the Union or is "thereafter established by the Legislature of "the Province." In view of this comparison it appears to their Lordships impossible to come to any other conclusion than that the 22nd section of the Manitoba Act was intended to be a substitute for the 93rd section of the British North America Act. Obviously all that was intended to be identical has been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier statute they must be regarded as indicating the variations from those provisions intended to be introduced in the Province of Manitoba.

In their Lordships' opinion, therefore, it is the 22nd section of the Manitoba Act which has to be construed in the present case, though it is of course legitimate to consider the terms of the earlier Act, and to take advantage of any assistance they may afford in the construction of enactments with which they so closely correspond, and which have been substituted for them.

Before entering upon a critical examination of this important section of the Manitoba Act, it will be convenient to state the circumstances under which that Act was passed, and also the exact scope of the decision of this Board in the case of *Barrett* v. *The City of Winnipeg*, which seems to have given rise to some misapprehension. In 1867 the Union of the Provinces of Canada, Nova Scotia and New Brunswick took place. Among the obstacles which had to be overcome in order to bring about that union, none, perhaps, presented greater difficulty than the differences of opinion which existed with regard to the question of education. It had been the subject of much controversy in Upper and Lower Canada. In Upper Canada a general system of undenominational education had been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that province. The 2nd sub-section of section 93 of the British North America Act extended all the powers, privileges and duties which were then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Roman Catholic inhabitants of that Province to the dissentient schools of the Protestant and Roman Catholic inhabitants of Quebec. There can be no doubt that the views of the Roman Catholic

inhabitants of Quebec and Ontario with regard to education were shared by the members of the same communion in the territory which afterwards became the Province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church. At the time when the Province of Manitoba became part of the Dominion of Canada, the Roman Catholic and Protestant populations in the province were about equal in number. Prior to that time there did not exist in the territory then incorporated any public system of education. The several religious denominations had established such schools as they thought fit, and maintained them by means of funds voluntarily contributed by the members of their own communion. None of them received any State aid.

The terms upon which Manitoba was to become a Province of the Dominion were matter of negotiation between representatives of the inhabitants of Manitoba and of the Dominion Government. The terms agreed upon, so far as education was concerned, must be taken to be embodied in the 22nd section of the Act of 1870. Their Lordships do not think that anything is to be gained by the inquiry how far the provisions of this section placed the Province of Manitoba in a different position from the other Provinces, or whether it was one more or less advantageous. There can be no presumption as to the extent to which a variation was intended. This can only be determined by construing the words of the section according to their natural signification.

Among the very first measures passed by the Legislature of Manitoba was an Act to establish a system of education in the Province. The provisions of that Act will require examination. It is sufficient for the present to say that the system established was distinctly denominational. This system, with some modifications of the original scheme, the fruit of later legislation, remained in force until it was put an end to by the Acts which have given rise to the present controversy.

In *Barrett's* case the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the Province *at the Union*. Their Lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed either by law or in practice was the right or privilege of establishing and maintaining for the use of members of their own church such schools as they pleased. It appeared to their Lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890. It was not doubted that the object of the 1st sub-section of section 22 was to afford protection to denominational schools, or that it was proper to have regard to the intent of the Legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this Board upon the 1st sub-section reduced within very narrow limits the protection afforded by that sub-section in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the Legislature, if violence were done to the language in which their legislation has taken shape, but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst, however, it is necessary to resist any temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the Legislature, it is quite legitimate, where more than one construction of a statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention.

With these preliminary observations their Lordships proceed to consider the terms of the 2nd and 3rd sub-sections of section 22 of the Act of 1870, upon the construction of which the questions submitted chiefly depend. For the reasons which have been given their Lordships concur with the majority of the Supreme Court in thinking that the main issues are not in any way concluded either by the decision in *Barrett's* case or by any principles involved in that decision.

At the outset this question presents itself. Are the 2nd and 3rd sub-sections, as contended by the Respondent, and affirmed by some of the Judges of the Supreme Court, designed only to enforce the prohibition contained in the 1st sub-section? The arguments against this contention appear to their Lordships conclusive. In the first place that sub-section needs no further provision to enforce it. It imposes a limitation

on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the Provincial Legislature, and therefore null and void. It was so decided by this Board in *Barrett's* case. A doubt was there suggested whether that appeal was competent, in consequence of the provisions of the 2nd sub-section, but their Lordships were satisfied that the provisions of sub-section 2 and 3 did not "operate to withdraw such a question as that involved in the case from the jurisdiction of the ordinary tribunals of the country." It is hardly necessary to point out how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor-General-in-Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If, for example, the Supreme Court of Canada and this Committee on Appeal declared an enactment of the Legislature of Manitoba relating to the education to be *intra vires*, and the Governor-General-in Council on an appeal to him considered it *ultra vires*, what would happen? If the Provincial Legislature declined to yeld to his view, as would almost certainly and most naturally be the case, recourse could only be had to the Parliament of the Dominion. But the Parliament of Canada is only empowered to legislate as far as the circumstances of the case require "for the due execution of the provisions" of the 22nd section. If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared *ultra vires* by the Courts which had decided that the provisions of the section had not been violated by the Legislature of the Province. If, on the other hand, the Governor-General declared a Provincial law to be *intra vires*, it would be an ineffectual declaration. It could only be made effectual by the action of the Courts, which would have for themselves to determine the question which he decided, and, if they arrived at a different conclusion and pronounced the enactment *ultra vires*, it would be none the less null and void because the Governor-General-in-Council had declared it *intra vires*. These considerations are of themselves most cogent to show that the 2nd sub-section ought not to be construed as giving to parties aggrieved an appeal to the Governor-General-in-Council concurrently with the right to resort to the Courts in case the provisions of the 1st sub-section are contravened, unless no other construction of the sub-sections be reasonably possible. The nature of the remedy, too, which the 3rd sub-section provides, for enforcing the decision of the Governor-General, strongly confirms this view. The remedy is either a provincial law or a law passed by the Parliament of Canada. What would be the utility of passing a law for the purpose merely of annulling an enactment which the ordinary tribunals would without legislation declare to be null, and to which they would refuse to give effect? Such legislation would indeed be futile.

So far the matter has been dealt with apart from an examination of the terms of the 2nd sub-section itself. The considerations adverted to would seem to justify any possible construction of that sub-section which would avoid the consequences pointed out. But when its language is examined, so far from presenting any difficulties, it greatly strengthens the conclusion suggested by the other parts of the section. The first sub-section is confined to a right or privilege of a "class of persons" with respect to denominational education "at the Union," the 2nd sub-section applies to laws affecting a right or privilege "of the Protestant or Roman Catholic minority" in relation to education. If the object of the 2nd sub-section had been that contended for by the Respondent, the natural and obvious mode of expressing such intention would have been to authorize an appeal from any Act of the Provincial Legislature affecting "any such right or privilege as aforesaid." The limiting words "at the Union" are however omitted; for the expression "any class of persons" there is submitted "the Protestant or Roman Catholic minority of the Queen's subjects," and instead of the words "with respect to denominational schools," the wider term "in relation to education" is used.

The 1st sub-section invalidates a law affecting prejudically the right or privilege of "any class" of persons, the 2nd sub-section gives an appeal only where the right or privilege affected is that of the "Protestant or Roman Catholic" minority." Any class of the minority is clearly within the purview of the 1st sub-section, but it seems equally clear that no class of the Protestant or Catholic minority would have a *locus standi* to appeal under the 2nd sub-section, because its rights or privileges had been affected. Moreover, to bring a case within that sub-section it would be essential to show that a right or privilege had been "affected." Could this be said to be the case because a void law had been passed which purported to do something but was wholly ineffectual? To prohibit a particular enactment and render it *ultra vires* surely prevents its affecting any rights.

It would do violence to sound canons of construction if the same meaning were to be attributed to the very different language employed in the two sub-sections.

In their Lordships' opinion the 2nd sub-section is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it. The question then arises, does the sub-section extend to rights and privileges acquired by legislation subsequent to the Union? It extends in terms to "any" right or privilege of the minority affected by an Act passed by the Legislature, and would therefore seem to embrace all rights and privileges existing at the time when such Act was passed. Their Lordships see no justification for putting a limitation on language thus unlimited. There is nothing in the surrounding circumstances, or in

the apparent intention of the Legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the Governor-General-in-Council against an Act passed by the Provincial Legislature because it abrogated rights conferred by previous legislation, whilst, if there had been no previous legislation, the Acts complained of would not only have been *intra vires* but could not have afforded ground for an appeal. There is no doubt force in the argument, but it admits, their Lordships think, of an answer.

Those who were stipulating for the provisions of section 22 as a condition of the Union, and those who gave their legislative assent to the Act by which it was brought about, had in view the perils then apprehended. The immediate adoption by the Legislature of an educational system obnoxious either to Catholics or Protestants would not be contemplated as possible. As has been already stated, the Roman Catholics and Protestants in the Province were about equal in number. It was impossible at that time for either party to obtain legislative sanction to a scheme of education obnoxious to the other. The establishment of a system of public education in which both parties would concur was probably then in immediate prospect. The Legislature of Manitoba first met on the 15th of March, 1871. On the 3rd of May following, the Education Act of 1871 received the Royal Assent. But the future was uncertain. Either Roman Catholics or Protestants might become the preponderating power in the Legislature, and it might, under such conditions be, impossible for the minority to prevent the creation at the public cost of schools which, though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions. The change to a Roman Catholic system of public schools would have been regarded with as much distaste by the Protestants of the province as to the change of an unsectarian system was by the Catholics.

Whether this explanation be the correct one or not, their Lordships do not think that the difficulty suggested is a sufficient warrant for departing from the plain meaning of the words of the enactment, or for refusing to adopt the construction which apart from this objection would seem to be the right one.

Their Lordships being of opinion that the enactment which governs the present case is the 22nd section of the Manitoba Act, it is unnecessary to refer at any length to the arguments derived from the provisions of section 93 of the British North America Act. But in so far as they throw light on the matter they do not in their Lordships's opinion weaken, but rather strengthen, the views derived from a study of the latter enactment. It is admitted that the 3rd and 4th sub-sections of section 93 (the latter of which is, as has been observed, identical with sub-section 3 of section 22 of the Manitoba Act), were not intended to have effect merely when a Provincial Legislature had exceeded the limit imposed on its powers by sub-section 1, for sub-section 3 gives an appeal to the Governor-General, not only where a system of separate or dissentient schools existed in a Province at the time of the Union, but also where in any province such a system was "thereafter established by the Legislature of the Province." It is manifest that this relates to a state of things created by post-Union legislation. It was said it refers only to acts or decisions of a "Provincial authority," and not to acts of a Provincial Legislature. It is unnecessary to determine this point, but their Lordships must express their dissent from the argument that the insertion of the words "of the Legislature of the Province" in the Manitoba Act show that in the British North America Act it could not have been intended to comprehend the Legislatures under the words "any Provincial authority." Whether they be so comprehended or not has no bearing on the point immediately under discussion.

It was argued that the omission from the 2nd sub-section of section 22 of the Manitoba Act of any reference to a system of separate or dissentient schools "thereafter established by the Legislature of the Province" was unfavourable to the contention of the Apellents. This argument met with some favour in the Court below. If the words with which the 3rd subsection of section 93 commences had been found in sub-section 2 of section 22 of the Manitoba Act, the omission of the following words would no doubt have been important. But the reason for the difference between the sub-sections is manifest. At the time the Dominion Act was passed a system of denominational schools adapted to the demands of the minority existed in some Provinces, in others it might thereafter be established by legislation, whilst in Manitoba in 1870 no such system was in operation, and it could only come into existence by being "thereafter established." The words which preface the right of appeal in the Act creating the Dominion would therefore have been quite inappropriate in the Act by whtch Manitoba became a Province of the Dominion. But the terms of the critical subsection of that Act are, as has been shown, quite general, and not made subject to any condition or limitation.

Before leaving this part of the case, it may be well to notice the argument urged by the Respondent that the construction which their Lordships have put upon the 1nd and 3rd subsections ot section 22 of the Manitoba Act is inconsistent with the power conferred upon the Legislature of the Province to "exclusively make laws in relation to education." The argument is fallacious. The power conferred is not absolute but limited. It is exercisable only "subject and according to the following provisions." The sub-sections which follow, therefore, whatever be their true construction,

define the conditions under which alone the Provincial Legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. Their right to legislate is not indeed, properly speaking, exclusive, for in the case specified in sub-section 3 the Parliament of Canada is authorized to legislate on the same subject. There is therefore no such inconsistency as was suggested.

The learned Chief Justice of the Supreme Court was much pressed by the consideration that there is an inherent right in a Legislature to repeal its own legislative acts and that "every presumption must be made in favour of "the constitutional right of a legislative body "to repeal the laws which it has itself enacted." He returns to this point more than once in the course of his judgment, and lays down as a maxim of constitutional construction that an inherent right to do so cannot be deemed to be withheld from a legislative body having its origin in a written constitution, unless the constitution in express words takes away the right, and he states it as his opinion that in construing the Manitoba Act the Court ought to proceed on this principle, and to hold the Legislature of that Province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless it could find some restriction of its rights in that respect in express terms in the Constitutional Act.

Their Lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other. It must be remembered that the Provincial Legislature is not in all respects supreme within the Province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament. In relation to the subjects specified in section 92 of the British North America Act, and not falling within those set forth in section 91, the exclusive power of the Provincial Legislature may be said to be absolute. But this is not so as regards education, which is separately dealt with and has its own code both in the British North America Act and in the Manitoba Act. It may be said to be anomalous and such a restriction as that in question should be imposed on the free action of a Legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the Legislature to the Executive authority? And yet this right is expressly and beyond all controversy conferred. If, upon the natural construction of the language used, it should appear that an appeal was permitted under circumstances involving a fetter upon the power of a Provincial Legislature to repeal its own enactments, their Lordships sees no justification for a leaning against that construction, nor do they think it makes any difference whether the fetter is imposed by express words or by necessary implication.

In truth, however, to determine that an appeal lies to the Governor-General in Council in such a case as the present does not involve the proposition that the Provincial Legislature was unable to repeal the laws which it had passed. The validity of the repealing Act is not now in question, nor that it was effectual. If the decision be favorable to the Appellants the consequence, as will be pointed out presently, will by no means necessarily be the repeal of the Acts of 1890 or the renactment of the prior legislation.

Bearing in mind the circumstances which existed in 1870 it does not appear to their Lordships an extravagant notion that in creating a Legislature for the Province with limited powers it should have been thought expedient, in case either Catholics or Protestants became preponderant, and rights which had come into existence under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority, as the case might be.

Taking it then to be established that the 2nd sub-section of section 22 of the Manitoba Act extends to rights and privileges of the Roman Catholic minority acquired by legislation in the Province after the Union, the next question is whether any such right or privilege has been affected by the Acts of 1890? In order to answer this question it will be necessary to examine somewhat more closely than has hitherto been done the system established by the earlier legislation as well as the change effected by those Acts.

The Manitoba School Act of 1871 provided for a Board of Education of not less than 10 nor more than 14 members, of whom one-half were to be Protestants and the other half Catholics. The two sections of the Board might meet at any time separately. Each section was to choose a chairman, and to have under its control and management the discipline of the schools of the section. One of the Protestant members was to be appointed Superintendent of the Protestnnt schools, and one of the Catholic members Superintendent of the Catholic schools, and these two were to be the joint secretaries of the Board, which was to select the books to be used in the schools, except those having reference to religion or morals which were to be perscribed by the sections respectively. The Legislative grant for common school education was to be appropriated, one moiety to support the Protestant, the other moiety to the Catholic schools. Certain districts in which the population was mainly Catholic were to be considered Catholic school districts, and certain other districts where the population was mainly Protestant were to be considered Protestant school districts.

Every year a meeting of the male inhabitants of each district, summoned by the Superintendent of the section to which the district belonged, was to appoint trustees, and to decide whether their contributions to the support of the schools were to be raised by subscription, by the collection of a rate per scholar, or by assessment on the property of the district. They might also decide to erect a school house, and that the cost of it should be raised by assessment. In case the father or guardian of a school child was a Protestant in a Catholic district or *vice versa*, he might send the child to the school of the nearest district of the other section, and in case he contributed to the school the child attended a sum equal to what he would have been bound to pay if he had belonged to that district, he was exempt from payment to the school of the district in which he lived.

Acts amending the education law in some respects were passed in subsequent years, but it is not necessary to refer to them, as in 1881 the Act of 1871 and these amending Acts were repealed. The Manitoba School Act of 1881 followed the same general lines as that of 1871. The number of the Board of Education was fixed at not more than 21, of whom 12 were to be Protestants and 9 Catholics. If a less number were appointed the same relative proportion was to be observed. The Board as before was to resolve itself into two sections, Protestant and Catholic, each of which was to have the control of the schools of its section, and *all* the books to be used in the schools under its control were now to be selected by each section. There were to be as before, a Protestant and a Catholic Superintendent. It was provided that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and Catholic district might include the same territory in whole or in part. The sum appropriated by the Legislature for common school purposes was to be divided between the Protestant and Roman Catholic section of the Board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts in the Province where schools were in operation. With regard to local assessments for school purposes it was provided that the ratepayers of a school district should pay their respective assessments to their respective denominations, and in no case was a Protestant ratepayer to be obliged to pay for a Catholic school, or a Catholic ratepayer for a Protestant school.

The scheme embodied in this Act was modified in some of its details by later Acts of the Legislature, but they did not affect in substance the main features, to which attention has been called. While traces of the increase of the Protestant relatively to the Catholic population may be seen in the course which legislation took, the position of the Catholic and Protestant portions of the community in relation to education was not substantially altered, though the State aid which at the outset was divided equally between them had of course to be adjusted and made proportionate to the school population which each supplied.

Their Lordships pass now to the Department of Education and Public School Acts of 1890 which certainly wrought a great change. Under the former of these Roman Catholics were not entitled as such to any representation on the Board of Education or on the Advisory Board, which was to authorize text books for the use of pupils and to prescribe the form of religious exercises to be used in schools. All Protestant and Catholic school districts were to be subject to the provisions of the Public School Act. The public schools were to be free, and to be entirely non-sectarian. No religious exercises were to be allowed unless conducted according to the regulations of the Advisory Board, and with the authority of the school trustees for the district. It was made the duty of the trustees to take possession of all public school property which had been acquired or given for public school purposes in the district. The Municipal Council of every city, town, and village was directed to levy and collect upon the taxable property within the Municipality such sums as might be required by the public school trustees for school purposes. No Municipal Council was to have the right to exempt any property whatever from school taxation. And it was expressly enacted that any school not conducted according to all the provisions of the Act, or the regulations of the Department of Education, or the Advisory Board, should not be deemed a public school within the meaning of the law, and that such school should not participate in the Legislative grant.

With the policy of these Acts their Lordships are not concerned, nor with the reasons which led to their enactment. It may be that as the population of the Province became in proportion more largely Protestant, it was found increasingly difficult, especially in sparsely populated districts, to work the system inaugurated in 1871, even with the modifications introduced in later years. But whether this be so or not is immaterial. The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate

share of the money contributed for school purposes out of the general taxation of the Province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which the State aid is granted to the schools provided for by the statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected.

Mr. Justice Taschereau says that the legislation of 1890, having been irrevocably held to be *intra vires*, cannot have "illegally" affected any of the rights and privileges of the Catholic minority. But the word "illegally" has no place in the sub-section in question. The appeal is given if the rights are in fact affected.

It is true that the religious exercises prescribed for public schools are not to be distinctly Protestant, for they are to be "non-sectarian," and any parent may withdraw his child from them. There may be many, too, who share the view expressed in one of the affidavits in *Barrett's* case, that there should not be any conscientious objections on the part of a Roman Catholic to attend such schools, if adequate means be provided elsewhere of giving such moral and religious training as may be desired. But all this is not to the purpose. As a matter of fact the objection of Roman Catholics to schools such as alone receive State aid under the Act of 1890 is conscientious and deeply rooted. If this had not been so, if there had been a system of public education acceptable to Catholics and Protestants alike, the elaborate enactments which have been the subject of so much controversy and consideration would have been unnecessary. It is notorious that there were acute differences of opinion between Catholics and Protestants on the education question prior to 1870. This is recognized and emphasised in almost every line of those enactments. There is no doubt either what the points of difference were, and it is in the light of these that the 22nd section of the Manitoba Act of 1870, which was in truth a Parliamentary compact, must be read.

For the reasons which have been given their Lordships are of opinion that the 2nd subsection of section 22 of the Manitoba Act is the governing enactment, and that the appeal to the Governer-General in Council was admissible by virtue of that enactment, on the grounds set forth in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that sub-section. The further question is submitted whether the Governor-General in Council has power to make the declarations or remedial orders asked for in the memorials or petitions, or has any other jurisdiction in the premises. Their Lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded, but the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd sub-section of section 22 of the Manitoba Act.

It is certainly not essential that the statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies, the wants of the great majority of the inhabitants of the Province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal is founded, and were modified so far as might be necessary to give effect to these provisions.

Their Lordships will humbly advise Her Majesty that the questions submitted should be answered in the manner indicated by the views which they have expressed.

There will be no costs of this appeal.